88 No. 1125

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Petitioners,

—v.—

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM Z. PENTELOVITCH, ESQ.
BECKY PALMER, ESQ.
CHARLES HOFFMAN, ESQ.
Maslon, Edelman, Borman & Brand
1800 Midwest Plaza
Minneapolis, Minnesota 55402
(612) 339-8015

Attorneys for Petitioner
Planned Parenthood of Minnesota

JANET BENSHOOF
(Counsel of Record)
RACHAEL PINE
LYNN PALTROW
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

LINDA OJALA, ESQ.
KURZMAN, GRANT & OJALA
2445 Park Avenue South
Minneapolis, Minnesota 55404
(612) 871-9004

Attorneys for Petitioners
Other Than Planned
Parenthood of Minnesota

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ABORTIONS—NOTICE TO PARENTS

CHAPTER 228

H.F. No. 284

An Act relating to health; prescribing procedures for notification of parents, guardians, and conservators prior to performing abortions on certain persons; providing a penalty; amending Minnesota Statutes 1980, Section 144.343.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Minnesota Statutes 1980, Section 144.343, is amended to read:

144.343. Pregnancy, venereal disease, and alcohol or drug abuse,

Subdivision 1. Minor's consent valid. Any minor may give effective consent for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse, and the consent of no other person is required.

Subd. 2. Notification concerning abortion. Notwithstanding the provisions of Minnesota Statutes, Section 15.162, Subdivisiosn 4, section 13.02, subdivision 8, no abortion operation shall be performed upon an unemancipated minor or upon a woman for whom a guardian or conservator has been appointed pursuant to sections 525.54 to 525.551 because of a finding of incompetency, until at least 48 hours after written notice of the pending operation has been delivered in the manner specified in subdivisions 2 to 4.

(a) The notice shall be addressed to the parent at his usual place of abode and delivered personally to the parent by the physician or his agent.

(b) In lieu of the delivery required by clause (a), notice shall be made by certified mail addressed to the parent at this usual palce of abode with return receipt requested and restricted delivery to the addressee which means postal

employee can only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

Subd. 3. Parent, abortion; definitions. For purposes of this section, "parent" means both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one.

For purposes of this section, "abortion" means the use of any means to terminate the pregnancy of a woman known to be pregnant with knowledge that the termination with those means will, with reasonable likelihood, cause the death of the fetus and "fetus" means any individual human organism from fertilization until birth.

Subd. 4. Limitations. No notice shall be required under this section if:

(a) The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; or

(b) The abortion is authorized in writing by the person or persons who are entitled to notice; or

(c) The pregnant minor woman declares that she is a victim of sexual abuse, neglect, or physical abuse as defined in section 626.556. Notice of that declaration shall be made to the proper authorities as provided in section 626.556, subdivision 3.

Subd. 5. Penalty. Performance of an abortion in violation of this section shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not he held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that

the representations of the pregnant woman regarding information necessary to comply with this section are bona fide and true, or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so.

Subd. 6. Substitute notification provisions. If subdivision 2 of this law is ever temporarily or permanently restrained or enjoined by judicial order, subdivision 2 shall be enforced as though the following paragraph were incorporated as paragraph (c) of that subdivision; provided, however, that if such temporary or permanent restraining order or injunction is ever stayed or dissolved, or otherwise ceases to have effect, subdivision 2 shall have full force and effect, without being modified by the addition to the following substitute paragraph which shall have no force or effect until or unless an injunction or restraining order is again in effect.

(c) (i) If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.

(ii) Such a pregnant woman may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court appointed counsel, and shall, upon her request, provide her with such counsel.

(iii) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting his decision and shall order a record of the evidence to be maintained including his own findings and conclusions.

(iv) An expedited confidential appeal shall be available to any such pregnant woman for whom the court denies an order authorizing an abortion without notification. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant woman at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant woman 24 hours a day, seven days a week.

Subd. 7 Severability. If any provision, word, phrase or clause of Laws 1981, Chapter 228 or the application thereof to any person or circumnstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of Laws 1981, Chapter 228 which can be given effect without the invalid provision, word, phrase, clause or application, and to this end the provisions, words, phrases, and clauses of Laws 1981, Chapter 228 are declared to be severable.

Approved May 19, 1981

144.346 Information to parents

The professional may inform the parent or legal guardian of the minor patient of any treatment given or needed where, in the judgment of the professional, failure to inform the parent or guardian would seriously jeopardize the health of the minor patient.

Laws 1971, c. 544, § 6, eff. May 27, 1971.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-81-538

Filed April 3, 1986

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L. and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Plaintiffs,

—v.—

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Defendants.

Jane Hodgson, M.D., et al,

Plaintiffs,

—v.—

The State of Minnesota, et al,

Defendants.

ORDER

The matter having come before this Court on the trial of the above captioned case and the Court having made certain rulings on the record pursuant to the agreement of counsel, it is on this 3rd day of April, 1986.

ORDERED that the attached caption be substituted in all future filings with the Court.

/s/ DONALD J. ALSOP
Honorable Donald J. Alsop,
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-81 CIV 538

Jane Hodgson, M.D.; Arthur Horowitz, M.D.; Michelle Roe, Alice Roe, Diane Roe, Nadine T., Janet T., and Ellen Z.: individually and on behalf of all other persons similarly situated; Lauren Z.; Meadowbrook Women's Clinic, P.A., Planned Parenthood of Minnesota, a nonprofit Minnesota corporation, Midwest Health Center for Women, P.A., a nonprofit Minnesota corporation; Women's Health Center of Duluth, P.A., a nonprofit Minnesota corporation,

Plaintiffs,

—v.—

The State of Minnesota; Rudy Perpich, as Governor of the Stte of Minnesota; Hubert H. Humphrey, III, as Attorney General of the State of Minnesota,

Defendants.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that The State of Minnesota, Rudy Perpich and Hubert H. Humphrey, III, defendants above named, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the final judgment entered against defendants in this action on the 6th day of November, 1986.

Dated: November 18, 1986.

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

By: _____

JOHN B. GALUS
Special Assistant
Attorney General

515 Transportation
Building
St. Paul, Minnesota 55155
Telephone: (612) 296-2654

Attorneys for Defendants

UNITED STATES DISTRICT COURT
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-81 CIV 538

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, DIANE ROE, NADINE T., JANET T., and ELLEN Z., individually and on behalf of all other persons similarly situated; LAUREN Z; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation, MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Plaintiffs,

—v.—

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

AMERICAN CIVIL LIBERTIES UNION FOUNDATION by JANET BENSHOOF, Esq., RACHAEL PINE, Esq. and SUZANNE LYNN, Esq. of New York, New York, appeared on behalf of plaintiffs.

MASLON, EDELMAN, BORMAN & BRAND by WILLIAM PENTELOVITCH, Esq. of Minneapolis, Minnesota, appeared on behalf of plaintiff Planned Parenthood of Minnesota.

HUBERT H. HUMPHREY, III, Attorney General of the State of Minnesota by JOHN GALUS, special Assistant Attorney General

and PETER M. ACKERBERT, Special Assistant Attorney General, St. Paul, Minnesota, appeared on behalf of defendants.

The above-entitled matter came before the court for trial from February 10, 1986, until March 13, 1986, and for argument on June 11, 1986. Having considered the evidence and being fully advised in the premises, the court makes the following:

FINDINGS OF FACT

1. *INTRODUCTION*

1. Plaintiffs Jane Hodgson, M.D., and Arthur Horowitz, M.D., are licensed physicians engaged in the practice of obstetrics and gynecology, including the performing of abortions, in Minnesota.

2. Plaintiff Meadowbrook Women's Clinic, P.A., provides birth control, abortions and related medical services to its patients, including unemancipated minor women under the age of 18 at a medical facility located in St. Louis Park, Minnesota.

3. Plaintiff Planned Parenthood of Minnesota provides birth control, abortions and related medical services to its patients, including unemancipated minor women under the age of 18, at a clinic located in St. Paul, Minnesota.

4. Plaintiff Midwest Health Center for Women provides birth control services, abortions, and related medical services to its patients, including unemancipated minor women under the age of 18, at a clinic located in Minneapolis, Minnesota.

5. Plaintiff Women's Health Center of Duluth, P.A., provides birth control services, abortions, and related medical services to its patients, including unemancipated minor women under the age of 18, at a clinic located in Duluth, Minnesota.

6. Plaintiff Alice Roe was a 16-year old unemancipated minor and seven weeks pregnant at the commencement of this

action. Alice Roe asserts that she was at that time mature and that notification of her parents of her desire to have an abortion would not have been in her best interests.

7. Plaintiff Michelle Roe was a 15-year-old unemancipated minor who was pregnant at the commencement of this action. Michelle Roe asserts that she was at that time mature and that notification of her parents of her desire to have an abortion would not have been in her best interests.

8. Diane Roe was a 16-year-old unemancipated minor and eight weeks pregnant at the commencement of this action. Diane Roe asserts that she was at that time mature and that notification of her parents of her desire to have an abortion would not have been in her best interests.

9. Plaintiff Nadine T. was a 16-year-old unemancipated minor and pregnant as of the time of the filing of the amended complaint in this action. Nadine T. asserts that she was at that time mature and that notification of her parents of her desire to have an abortion would have not been in her best interests.

10. Plaintiff Janet T. was a 16-year-old unemancipated minor and pregnant as of the time of the filing of the amended complaint in this action. Janet T. asserts that she was at that time mature and that notification of her father of her desire to have an abortion would have not been in her best interests.

11. Ellen Z. was a 17-year-old unemancipated minor and pregnant as of the time of the filing of the amended complaint in this action. Ellen Z. asserts that she was then mature and that notification of her father of her desire to have an abortion would not have been in her best interests.

12. Plaintiffs Alice Roe, Michelle Roe, Diane Roe, Nadine T., Janet T., and Ellen Z. represent a class composed of pregnant minors who assert that they are mature and that notification of one or both of their parents would not be in their best interests.

13. Lauren Z. is the mother of plaintiff Ellen Z. Lauren Z. asserts that notification of Ellen Z.'s father of Ellen Z.'s desire

to have an abortion would not have been in Ellen Z.'s best interests.

14. Defendants are the State of Minnesota, its Governor and its Attorney General.

15. In 1981, the Legislature of the State of Minnesota enacted Minn. Laws 1981, ch. 228, codified as Minn. Stat. § 144.343 (2)-(7). The statute was to become effective August 1, 1981.

16. Subdivision 2 of the statute generally requires physicians or their agents to attempt with reasonable diligence to notify the parents of an unemancipated minor under the age of 18 at least 48 hours before performing an abortion. Subdivision 3 defines "parent" as both parents if both are living, one parent if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one. Subdivision 4 of the statute provides that the statutory notice requirement does not apply when the parents have consented to the abortion, when prompt action is needed to preserve the life of the minor, or when the minor reports that she is a victim of sexual or physical abuse or neglect as defined in Minn. Stat. § 626.556. Subdivision 5 subjects anyone performing an abortion in violation of Minn. Stat. § 144.343 (2)-(7) to criminal penalties and civil liability.

17. Subdivision 6 of the statute provides, in the alternative, that if subdivision 2 is ever enjoined by judicial order, then the same notice requirement shall be effective together with an optional procedure whereby an unemancipated minor may obtain a court order permitting an abortion without notice to her parents upon showing that she is mature and capable of giving informed consent to an abortion or, if she is not mature, that an abortion without notice to her parents nevertheless would be in her best interests.

18. In their amended complaints, plaintiffs seek a declaratory judgment that Minn. Stat. § 144.343 (2)-(7) violates the constitutions of the United States and the State of Minnesota and seek a permanent injunction against its enforcement. More particularly, plaintiffs claim that the statute violates their due

process rights, both on its face and as applied; that the statute violates the equal protection clause; and that the statute violates the due process, privacy and equal protection provisions of Article 1 of the Minnesota Constitution and also constitutes the delegation of administrative power to Minnesota state courts in violation of article 3 of the Minnesota Constitution.

19. Before the statute took effect on August 1, 1981, plaintiffs sought a temporary restraining order and preliminary injunction against the statute.

20. On July 31, 1981, the court temporarily restrained enforcement of subdivision 2 of the statute, but denied plaintiffs' motion for an order temporarily restraining enforcement of subdivision 6. On March 22, 1982, the court preliminarily enjoined subdivision 2 but denied a preliminary injunction of subdivision 6. By virtue of these two rulings, the parental notification requirement and the judicial bypass option of subdivision 6 went into effect on August 1, 1981, and have remained in effect since that date.

21. By memorandum order of January 23, 1985, the court granted in part and denied in part defendants' motion for partial summary judgment as to all of plaintiffs' claims concerning the judicial bypass procedure of subdivision 6. Specifically, the court granted partial summary judgment for defendants by dismissing all of plaintiffs' state constitutional claims on jurisdictional grounds and by ruling that, on its face, the judicial bypass procedure in subdivision 6 does not violate the constitutional equal protection and due process rights of pregnant minors. The court concluded, however, that plaintiffs should have the opportunity of a trial to prove their allegations that subdivision 6 is being applied unconstitutionally.

II. *AVAILABILITY OF ABORTION SERVICES IN THE STATE OF MINNESOTA*

22. Abortion services are less accessible in Minnesota than in the country as a whole. In Minnesota, 94% of the counties, or 82 out of 87 counties, have no readily available abortion provider. In 1982, 44% of women in Minnesota ages 15-44 lived in

a county with an abortion provider as compared to 72% of the same group in the country as a whole.

23. Access to information about abortion services in outstate Minnesota is comparatively limited. Many second trimester patients come from counties with no abortion providers and thus with no media advertising or listing in telephone books for abortion services.

24. Abortions are performed in only four public and nine private hospitals in Minnesota, and then only if a staff doctor requests it. There are only two hospitals where a patient can walk in and obtain an abortion: Hennepin County Medical Center and St. Paul-Ramsey. Virtually all of Minnesota's abortion providers are located in the two major metropolitan areas of the state: Duluth and Minneapolis-St. Paul. Many women have to travel long distances to obtain abortion services.

25. The transportation problems facing women seeking abortion in Minnesota are illustrated by the experiences of those attending the Women's Health Center Clinic in Duluth. The Health Center serves women from 24 counties in Minnesota, 14 counties in Wisconsin, 4 counties in Michigan and the Canadian Province of Ontario. Some of the women served by the Health Center drive six to seven hours to get to the clinic. Airline flights are not available from some areas. Bus service from some areas is infrequent, requiring some women to spend the night in Duluth.

Having to travel long distances creates barriers to obtaining services. These barriers include increased cost, particularly if lodging is required; delayed pregnancy diagnosis and delayed treatment of post-abortion complications; jeopardized privacy of women away from home; and more hazardous travel during winter.

Nearly 30% of all abortions performed in Minnesota in 1982 were obtained by women who lived outside the Twin Cities metropolitan area, an increase of 20% since 1976. The farther a women [sic] has to travel to obtain a abortion, the less likely she is to obtain one.

26. Women of all ages in Minnesota have abortions later in their pregnancies than in the United States as a whole. In 1981, 9.5% of women having abortions in the United States had second trimester abortion, while 13.5% of all women obtaining abortions in Minnesota did so in their second trimester. In 1982, 15% of women from outside the metropolitan area who had abortions did so during the second trimester as compared with only 10% of metro area women.

27. The cost of an abortion increases with gestational age because the procedure becomes more difficult and requires more skill on the part of the doctor. The Meadowbrook Clinic has the following fee schedule: under 12 weeks gestation, $225; 12-14 weeks, $275; 14-16 weeks, $395; 16-18 weeks, $450; 18-19 weeks, $550; 19-21 weeks, $650. After 21 weeks, Meadowbrook refers patients to St. Paul-Ramsey Hospital where a later abortion (22 weeks) costs $1600-1800; or to Wichita, Kansas, where a late abortion (up to 24 weeks) costs $2000 cash. None of these fees includes the cost of transportation or lodging. Minnesota will fund abortions for indigent women only if the pregnancy is the result of rape or incest, or if continuing the pregnancy would endanger the life of the woman.

28. Unfavorable publicity surrounding the abortion procedures and delivery of services has dissuaded some physicians from performing abortions. For example, the Women's Health Center in Duluth has been unable to contract local physicians to perform abortions. The Center has had to import physicians from small communities some distance from Duluth. Physicians are also concerned about the bombings of clinics and doctors' offices. Consequently, some physicians refer their abortion patients elsewhere.

III. *APPLICATION OF MINN. STAT. § 144.343 IN MINNESOTA, AUGUST 1, 1981, TO MARCH 13, 1986.*

A. *Compliance with* Bellotti v. Baird, *432 U.S. 622 (1979)*

1. *Legal Standard*

29. Minnesota Statutes § 144.343 (6) provides:

> (c)(i) If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.

30. With the exception of a hearing occurring shortly after the enactment of § 144.343, judges in Minnesota have faithfully applied the standards set forth in subdivision 6. Those judges who consider themselves unable to faithfully apply this standard have consistently refused to hear bypass petitions.

31. Courts hearing bypass petitions regularly appoint guardians ad litem and provide appointed counsel to assist minors participating in bypass proceedings.

32. Judges, public defenders, and guardians ad litem do not adhere to a single interpretation of either the "maturity" or "best interests" standard. However, the variation in interpretation of these standards does not exceed that typical of verbally expressed legal standards. Moreover, these differences of inter-

pretation do not produce different results in actual bypass proceedings.

2. *Expedition*

33. Courts in Hennepin, Ramsey, and St. Louis Counties schedule bypass hearings on a regular basis. When necessitated by pressing need, these courts will hear a number of petitions greater than that normally scheduled for a single day. These courts also have in place procedures for hearing bypass petitions outside of normal business hours on an emergency basis.

34. Two or three days commonly elapse between a minor's first contact with the court and the hearing on her petition. A delay of this duration creates an increased medical risk to an abortion patient, albeit small in magnitude, and may increase the emotional tension attendant upon the judicial proceeding. Moreover, this delay sometimes combines with scheduling difficulties of a minor or her clinic to produce a longer delay. Thus, the delay in judicial bypass system as executed by courts in the metropolitan counties is burdensome to minor petitioners. However, this delay and its resultant burden are unavoidable and do not reflect a systemic failure to provide a judicial bypass option in the most expeditious practicable manner.

35. Although the court systems of the non-metropolitan areas have had less frequent occasion to apply the judicial bypass procedures than Hennepin, Ramsey, and St. Louis County courts, these court systems are acquainted with the statute and have applied it conscientiously when called upon to do so.

36. Courts of non-metropolitan counties called upon to hear bypass petitions generally have complied with their statutory obligation to advise petitioners of their right to appointed counsel and to provide such counsel upon request. These courts also generally have appointed guardians ad litem to assist petitioners.

37. Despite conscientious efforts to provide an expeditious court bypass option in non-metropolitan areas, a number of

counties are not served by a judge who is willing to hear bypass petitions. A minor in one of these counties must travel to another county, most commonly a metropolitan county, to obtain an expeditious hearing of her petition. Although burdensome, this necessity also does not reflect a systematic failure to provide a judicial bypass option in the most expeditious practicable manner.

38. On August 13, 1981, the Supreme Court of Minnesota issued an order directing that all petitions under subdivision 6 should initially be filed in and considered by the county courts throughout the state or, in the cases of Hennepin and Ramsey Counties, in the juvenile division of the district court of those two counties. In the same order, the Minnesota Supreme Court directed that all appeals should be on the record to a judge of the district court, including the district courts of Hennepin and Ramsey counties.

39. In an amended and supplemental order effective July 1, 1984, the Supreme Court of Minnesota provided that in a unified judicial district, an order denying a petition pursuant to the judicial bypass procedure shall be appealable on the record to two district court judges and if there be a division between those judges, the order denying the petition should stand.

40. No minor has been unable to obtain an expeditious appeal of an order denying her bypass petition.

3. *Anonymity*

41. Judges, public defenders, guardians ad litem, and court personnel involved in bypass proceedings are aware that Minn. Stat. § 144.343 (6) requires that bypass proceedings be kept strictly confidential. Those involved in the proceedings take steps to insure confidentiality, including destroying interview notes, holding hearings in judges' chambers rather than in open court, and referring to petitioners by first name only. In addition, public defenders and courts have departed from normal routines when adhering to the routine would have threatened confidentiality.

42. The record discloses that the confidentiality of minors electing the judicial bypass option has been breached only in a small number of isolated cases.

B. *Burdens Imposed by Minn. Stat § 144.343 (2)-(7)*

1. *Judicial Bypass Procedure*

43. As discussed above, scheduling practices in Minnesota courts typically require minors to wait two or three days between their first contact with the court and the hearing on their petitions. This delay may combine with other factors to result in a delay of a week or more. A delay of this magnitude increases the medical risk associated with the abortion procedures to a statistically significant degree. Even a shorter delay may push the minor into the second trimester, when the abortion procedure entails significantly greater costs, inconvienence, and medical risk.

44. The experience of going to court for a judicial authorization produces fear and tension in many minors. Minors are apprehensive about the prospect of facing an authority figure who holds in his hands the power to veto their decision to proceed without notifying one or both parents. Many minors are angry and resentful at being required to justify their decision before complete strangers. Despite the confidentiality of the proceeding, many minors resent having to reveal intimate details of their personal and family lives to these strangers. Finally, minors are left feeling guilty and ashamed about their lifestyle and their decision to terminate their pregnancy. Some mature minors and some minors in whose best interests it is to proceed without notifying their parents are so daunted by the judicial proceeding that they forego the bypass option and either notify their parents or carry to term.

Some minors are so upset by the bypass proceeding that they consider it more difficult than the medical procedure itself. Indeed, the anxiety resulting from the bypass proceeding may linger until the time of the medical procedure and thus render the latter more difficult than necessary.

2. *Two Parent Notice Requirement*

45. A minor who chooses not to go to court to avoid notifying her parents must notify both parents, if they are living, unless the second one cannot be located through reasonably diligent effort. The statute makes no exception for a non-custodial parent who is divorced or separated from the custodial parent, or for a parent who never married the custodial parent. No exception is made in the case of a parent, custodial or not, whom the minor considers likely to react abusively to notification, unless the minor is willing to declare that she is a victim of sexual or physical abuse.

46. If a minor declares that she is the victim of sexual or physical abuse, Minn. Stat. § 144.343(4)(c) obligates the recipient of this information to report it to the local welfare agency, police department, or the country sheriff pursuant to Minn. Stat. § 626.556(3). This obligation binds counselors and physicians at abortion clinics. The welfare agency must report the information to the law enforcement agency, and vice versa. Minn. Stat. § 626.556(3).

47. Minors who are victims of sexual or physical abuse often are reluctant to reveal the existence of the abuse to those outside the home. More importantly, notification to government authorities creates a substantial risk that the confidentiality of the minor's decision to terminate her pregnancy will be lost. Thus, few minors choose to declare they are victims of sexual or physical abuse despite the prevalence of such abuse in Minnesota, as elsewhere.

48. In practice, the requirement that the minor notify both parents, if living, affects many minors in single parent homes who have voluntarily notified the custodial parent. No exception is made, for example, in the case of a non-custodial parent who for years has exhibited no interest in the minor's development. No exception is made for parents likely to react with psychological, sexual or physical violence toward either the minor or the custodial parent. Minors in such circumstances must notify the non-custodial parent, or else go to court for authorization to proceed without notifying the non-custodial parent.

Notification of an abusive or even a disinterested absent parent may reintroduce that parent's disruptive or unhelpful participation into the family at a time of acute stress. Alternatively, going to court to seek authorization introduces a traumatic distraction into the family relationship at a stressful juncture. The emotional trauma attending either option tends to interfere with and burden the parent-child communication the minor voluntarily initiated with the custodial parent.

49. The two parent notification requirement also affects minors in two parent homes who voluntarily have consulted with one parent but not with the other out of fear of psychological, sexual, or physical abuse toward either the minor or the notified parent. Here, too, the minor must choose either to notify the second parent or to endure the court bypass procedure. Once again, the emotional trauma attending either option tends to interfere with and burden the parent-child communication the minor voluntarily initiated with the custodial parent.

50. Instances, such as those described above, in which the requirement that the minor notify both parents of her decision interferes with and burdens parent-child ommunication voluntarily initiated by the minor are not uncommon. Approximately 20-25% of minors who go to court for authorization are accompanied by one parent or indicate that they have already consulted with one parent.

3. *Forty-Eight Hour Waiting Period*

51. Minors who elect to notify one or both parents by written notice, including those whose parents refuse to sign acknowledgement forms despite having been told of their daughters' decision, must wait until 48 hours after actual or constructive delivery of written notice. Constructive delivery of mailed notice occurs at noon on the regular mail delivery day following mailing. Thus, Minn. Stat. § 144.343 delays effectuation of a minor's decision to terminate her pregnancy by at least 48 hours and more commonly by 72 hours.

52. This statutorily imposed delay frequently is compounded by scheduling factors such as clinic hours, transportation

requirements, weather, a minor's school and work commitments, and sometimes a single parent's family and work commitments. In many cases, the effective length of the delay may reach a week or more.

53. Delay of any length in performing an abortion increases the statistical risk of mortality and morbidity. The increase in risk becomes statistically significant when the length of delay reaches one week. Moreover, even delays of less than one week may push a woman into the second trimester. Second trimester procedures entail significantly greater costs, inconvenience, and risk.

C. *Results of Bypass Proceedings, August 1, 1981, to March 1, 1986*

54. The parties agreed to submit statistics reflecting disposition of bypass petitions filed in Minnesota from August 1, 1981, to March 1, 1986, in the form of tables compiling information obtained by affidavit from court officials in each Minnesota county. The table summarizing these statistics by judicial district is appended hereto.

55. During the period for which statistics have been compiled, 3,573 bypass petitions were filed in Minnesota courts. Six petitions were withdrawn before decision. Nine petitions were denied and 3,558 were granted.

56. Anomalous circumstances surrounded several of the petitions which were denied. Three denials occurred in Hennepin County. The Honorable Allen Oleisky, Judge of the Hennepin County District Court, Juvenile Division, recalls denying two of the more than one thousand petitions he has heard. One of these petitions was brought by a minor who did not actually wish to have an abortion, but rather to marry her boyfriend. Judge Oleisky denied the petition in order to assist the minor in effectuating this desire by shifting responsibility for preventing the abortion from the minor to the court. The second denial involved a minor whom the judge determined was being coerced into having an abortion by her parents. After determining the

minor did not actually wish to have an abortion, Judge Oleisky denied the petition.

The Honorable Gerald G. Martin, County Court Judge for the St. Louis County Family and Juvenile Court, granted all but one of the 225 or 226 petitions he heard during the period for which statistics were compiled. The petition Judge Martin denied was submitted by a rather immature 14 year old who was accompanied to court by her mother. The minor's father had been out of contact with the minor and her mother for more than seven years. Rather than proceed to the best interests inquiry, Judge Martin denied the petition because he was certain a notice mailed to the father's last known address would not reach him.

57. The single denials occurring in Anoka, Mower, and Lyon Counties each occurred in the first petition brought in those respective counties. The Nobles County Court denied one of the two petitions brought there to date. A comparison to the experience in the metropolitan counties, where the courts have heard large numbers of petitions and granted nearly all, suggests that some or all of the denials occurring in non-metropolitan counties are due more to the courts' unfamiliarity with the judicial bypass statute than to the petitioners' immaturity or best interests. For example, the Anoka County Court denied the first petition brought before it and then granted each of the 19 petitions heard during the remainder of the period for which statistics were compiled.

D. *Effectuation of State Interests*

1. *Asserted State Interests*

58. The Minnesota legislature had several purposes in mind when it amended Minn. Stat. § 144.343 in 1981. The primary purpose was to protect the well-being of minors by encouraging minors to discuss with their parents the decision whether to terminate their pregnancies. Encouraging such discussion was intended to achieve several salutory results. Parents can provide emotional support and guidance and thus forestall irrational and emotional decision-making. Parents can also provide information concerning the minor's medical history of which the minor may not be aware. Parents can also supervise post-abortion care. In addition, parents can support the minor's psychological sequelae that may attend the abortion procedure.

59. The court finds that a desire to deter and dissuade minors from choosing to terminate their pregnancies also motivated the legislature. Testimony before a legislative committee considering the proposed notification requirement indicated that influential supporters of the measure hoped it "would save lives" by influencing minors to carry their pregnancies to term rather than aborting.

2. *Testimony as to Beneficial Effect of Minn. Stat. § 144.343*

a. *Judicial Bypass/Notice Requirement*

60. The court heard testimony of judges who collectively have adjudicated over 90 percent of the parental notification petitions filed since August 1, 1981. None of these judges, on direct or cross examination, identified a positive effect of the law.

Honorable Allen Oleisky has heard over 1,000 parental notification petitions. He characterizes his function as "a routine clerical function on my part, just like putting my seal and stamp on it." Moreover, he believes that the statute dissuades some minors from having abortions because of the fear of going to court in a distant city.

Honorable Gerald Martin stated that he doesn't "perceive any useful public purpose to what [he is] doing in these cases;" moreover, he finds the court experience difficult for minors. "I think they find it a very nervewracking experience," he testified.

Honorable Neil Riley testified that he saw no beneficial effects of the statute and further that he sympathized with "the predicament" the minors were in.

Honorable William Sweeney testified, "I know as a judge you would like to think your decisions are important, that you are providing some—you are doing some legitimate purpose.

What I have come to believe . . . [is] that really the judicial function is merely a rubber stamp. The decision has already been made before they have gotten to my chambers. The young women I have seen have been very mature and capable of giving the required consent."

He further testified that "the level of apprehension that I have seen contrasted with even the orders for protection, which is a very intense situation, very volatile, and the custody questions, is that the level of apprehension is twice what I normally see in court . . . . You see all the typical things that you would see with somebody under incredible amounts of stress, answering monosyllabically, tone of voice, tenor of voice, shaky, wringing of hands, you know, one young lady had her—her hands were turning blue and it was warm in my office . . . ."

Mr. Paul Garrity, who adjudicated the same bypass petitions while a judge in Massachusetts, believed that the Massachusetts law accomplished nothing. "It just gives these kids a rough time. I can't think it accomplishes a darn thing. I think it basically erects another barrier to abortion." Further, he felt going to court was "absolutely" traumatic for minors. "You know, it was just—it was just another thing at a very, very difficult time in their lives," he said.

61. Clinic counselors, who participate on a daily basis in the law's implementation, are of a similar mind. Paula Wendt has counseled or supervised the counseling of more than 3,000 minors since the law went into effect. She concludes from her conversations with both parents and minors that the law has not promoted family integrity or communication. The law has, more than anything, disrupted and harmed families.

On the basis of her experience, Tina Welsh concludes that the law has not benefitted intra-family communication. A minor's unplanned pregnancy is a crisis which is not conducive to an attempt to build good family communications. Ms. Welsh does not believe that the law helps teenagers make a better decision about whether to [sic] have an abortion or continue the pregnancy. Requiring a minor to tell either her parents or a judge about her pregnancy and the reasons she wants an abortion makes no beneficial contribution to the minor's decision.

62. The public defenders who participate in bypass proceedings believe that the law serves no beneficial purpose. Its sole function, in their view, is to create a hurdle and impose additional stress upon the young women. Similarly, the guardians ad litem do not perceive a beneficial purpose to their participation in the process.

63. In most cases, minors seeking judicial authorization to terminate their pregnancies without informing their parents have already made up their minds before coming to court. Thus, judges, public defenders, and guardians ad litem find they impart no information and provide no counseling in the course of the bypass proceeding. Neither does the court system refer minors to their parents for guidance and support, as is demonstrated by the overwhelming rate of approval. At most, the bypass proceeding furthers the state's interest in providing minors with guidance and emotional support only insofar as the abortion clinics have expanded their counseling of minors at the insistence of judges who hear the petitions. Counselors and administrators from the major Minnesota clinics testified, however, that counseling of minors going to court and that of minors who do not differs merely in that the former are counseled about the court process and the latter are not.

64. Minors who seek authorization in Minnesota courts for confidential abortions tend to be above average in intelligence, education, and personal motivation. They also tend to be ambitious and concerned about the effect their decision will have on their futures.

65. Minnesota courts have denied only an infinitesimal proportion of the petitions brought since 1981. This fact indicates that in Minnesota immature, non-best interest minors rarely seek judicial authorization to terminate their pregnancies without parental involvement. Such minors either inform their parents, obtain an abortion outside Minnesota, or carry the pregnancy to term.

Dr. Gary B. Melton suggested two partial explanations for this phenomenon. First, comparisons of personality functioning between adolescents who abort and those who carry to term

generally show more adaptive, healthier functioning in the former group. Adaptation, in turn, marks a level of psychological and emotional development colloquially referred to as "maturity." Second, minor's desire to maintain a measure of privacy of information about her personal matters is an important indication of individuation, a principal development task of adolescence. Indeed, defendants' witness Dr. Vincent Rue testified that teenagers in the early stage of adolescence are much more likely to discuss a pregnancy than are teenagers in the mid-phase of adolescence who typically would desire more privacy, and teenagers in the latter stages of adolescence who would be the most private, and insist upon confidentiality. Adult women, in Dr. Rue's view, would be most insistent upon maintaining the confidentiality of their decision. Therefore, while there may be "no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion," *H. L. v. Matheson*, 450 U.S. 398, 408 (1981), some relationship does exist between the decision to abort in privacy and the capacity for mature judgment concerning the wisdom of this decision. Consequently, a regulation that affects only minors who have elected to terminate their pregnancies and to do so in privacy tends inevitably to reach only mature minors and immature minors driven to this choice by their own best interests. Such a regulation will fail to further the State's interest in protecting immature, non-best interest minors.

66. Dr. Jane Hodgson, a leading practitioner in the field of obstetrics and gynecology, has given Minnesota's parental notification law considerable thought. She concludes, "I honestly think there is no benefit whatsoever." The law has created "nothing but problems" for her teenage patients. Testimony by plaintiffs' other expert witnesses, each of unquestionably high standing in his or her respective field, corroborates this opinion. For example, Dr. Stephen Butzer testified, on the basis of his clinical experience, that when knowledge of an adolescent's pregnancy or abortion is inadvertently communicated to one or both parents, the effect of the communication on the family or

relationship between adolescent and parents is "almost universally negative."

67. Defendants offered the court no persuasive testimony upon which to base a finding that Minnesota's parental notification law enhances parent-child communications, or improves family relations generally. Dr. Vincent Rue possesses neither the academic qualifications nor the professional experience of plaintiffs' expert witnesses. More importantly, his testimony lacked the analytical force of contrary testimony offered by plaintiffs' witnesses. Dr. Richard T. F. Schmidt does not practice medicine in Minnesota, has never performed an abortion, and does not regularly counsel minors who wish to obtain abortions. Therefore, his testimony is less persuasive than the contrary testimony of witnesses closer in each of these respects to the issue before the court.

The court did not expect defendants to establish that in every case Minnesota's parental notification law protects pregnant minors, promotes parent-child communication, and improves family relations generally. Defendants did establish that notification can serve these interests in individual cases. Defendants failed, however, to establish that the law promotes these values more than it undermines them. Five weeks of trial have produced no factual basis upon which the court can find that Minn. Stat. § 144.343(2)-(7) on the whole furthers in any meaningful way the State's interest in protecting pregnant minors or assuring family integrity.

b. *Two Parent Requirement*

68. National statistics reveal that approximately one out of every two marriages ends in divorce. There is no testimony in the trial of this case indicating that the divorce rate in Minnesota differs from the national average. To the contrary, clinic experience indicates that only 50% of minors in the state of Minnesota reside with both biological parents. This figure is corroborated by one study indicating that 9% of minors in Minnesota live with neither parent, 33% live with only one parent and thus 42% do not live with both biological parents.

69. Studies indicating that family violence occurs in two million families in the United States substantially underestimate the actual number of such families. In Minnesota alone, reports indicate that there are an average of 31,200 incidents of assault on women by their partners each year. Based on these statistics, state officials suggest that the "battering" of women by their partners "has come to be recognized as perhaps the most frequently committed violent crime in the state" of Minnesota. These numbers do not include incidents of psychological or sexual abuse, low-level physical abuse, abuse of any sort of the child of a batterer, or those incidents which are not reported. Many minors in Minnesota live in fear of violence by family members; many of them are, in fact, victims of rape, incest, neglect and violence. It is impossible to accurately assess the magnitude of the problem of family violence in Minnesota because members of dysfunctional families are characteristically secretive about such matters and minors are particularly reluctant to reveal violence or abuse in their families. Thus the incidence of such family violence is dramatically underreported.

70. Divorce or separation usually impairs family communication severely. The non-custodial parent often has very little communication with the child. In addition, communication between divorced or separated spouses frequently is marked with the kind of hostility and angry vindictiveness that characterized the divorce or separation.

The effect of compelling an adolescent to share information about her pregnancy and abortion decision with both parents in a divorced or separated situation can be harmful. The non-custodial parent often will reintegrate with the family in a disruptive manner. The adolescent may be perplexed as to why the non-custodial parent should become an important factor in her life at this point, especially when the parent previously has paid her oittle [sic] attention and offered little support. Moreover, the testimony revealed no instances in which beneficial relations between a minor and an absent parent were reestablished following required notification. Therefore, the minor may suffer disappointment when an anticipated reestablishment of her

relationship with the absent parent does not occur, as is most likely given the trying circumstances under which communication is renewed.

Involuntary involvement of the second biological parent is especially detrimental when the minor comes from an abusive, dysfunctional family. Notification of the minor's pregnancy and abortion decision can provoke violence, even where the parents are divorced or separated. Studies have shown that violence and harrassment may continue well beyond the divorce, especially when children are involved.

The reaction of the custodial parent to the requirement of forced notification is often one of anger, resentment and frustration at the intrusion of the absent parent. Frequently, the custodial parent fears that the absent parent will use the notification to threaten the custody rights of the custodial parent. Furthermore, a mother's perception in a dysfunctional family that there will be violence if the father learns of the daughter's pregnancy is likely to be an accurate perception.

71. Twenty to twenty-five percent of the minors who go to court either are accompanied by one parent who knows and consents to the abortion or have already told one parent of their intent to terminate their pregnancy. The vast majority of these voluntarily informed parents are women who are divorced or separated from spouses whom they have not seen in years. Going to court to avoid notifying the other parent burdens the privacy of both the minor and the accompanying parent. The custodial parents are angry that their consent is not sufficient and fear tht notification will bring the absent parent back into the family in an intrusive and abusive way.

72. Minors who ordinarily would notify one parent may be dissuaded from doing so by the two-parent requirement. A minor who must go to court for authorization in any event may elect not to tell either parent. In these instances, the requirement that minors notify both biological parents actually reduces parent-child communication.

c. *48 Hour Waiting Period*

73. Some period of mandatory delay between the time of actual or constructive notification of the minor's parent and the abortion itself would reasonably effectuate the State's interest in protecting pregnant minors. A waiting period may allow parents to aid, counsel, advise, and assist minors in determining whether to undergo an abortion or to provide the physician with information which may be relevant to the medical judgments involved.

74. The interest effectuated by the State's 48 hour waiting period could be effectuated as completely by a shorter waiting period. Therefore, to the extent the waiting period exceeds that necessary to allow parents to consult with minors contemplating abortion, it fails to further the State's interest in protecting pregnant minors.

CONCLUSIONS OF LAW

Plaintiffs attack the constitutionality of Minn. Stat. § 144.343 on several fronts. First, plaintiffs contend that § 144.343, subd. 2 is facially unconstitutional because it fails to afford minors the opportunity to obtain a judicial or administrative waiver of the statute's notification requirement. *See Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476 (1983) (*Ashcroft*); *Bellotti v. Baird*, 432 U.S. 622 (1979) (*Bellotti II*). Second, plaintiffs contend that even with the judicial bypass procedure of subd. 6 incorporated as subd. 2(c) by virtue of this court's temporary restraining order of July 31, 1981, § 144.343(2)-(7), as applied in Minnesota, unduly burdens the fourteenth amnedment due process rights of pregnant minors. Even if § 144.343(2)-(7) is not unconstitutional in its entirety, plaintiffs contend that the statute's requirement that minors notify both parents except when one parent is dead or the minor is unable to locate a parent with reasonable diligence, § 144.343(2), (3), is unconstitutional. Finally, plaintiffs contend the 48-72 hour waiting period imposed upon minors who choose to notify one or both of their parents in writing, *see*

Minn. Stat. § 144.343(2)-(4), is unconstitutional because it impermissibly burdens a minor's right to choose abortion.

Noting "a requirement unduly burdensome in operation will be struck down even if not clearly invalid on its face," *see Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006, 1011 (1st Cir. 1981), this court denied defendant's motion for summary judgment with respect to plaintiffs' as applied due process challenge to § 144.343(2)-(7). *Hodgson v. Minnesota*, Civ. No. 3-81 538 slip op. at 11 (Jan. 23, 1985). The court found that dispute existed with respect to material issues of fact including the confidentiality of the judicial bypass procedure, delays and inconvenience, and lack of access to the courts in rural counties. This list of material facts was not all inclusive. *Hodgson*, slip op. at 10. Therefore, the action proceeded to trial upon these issues and others.

I. *STANDARD OF REVIEW*

Every woman has the fundamental right to terminate her pregnancy free from unwarranted government intrusion. *Roe v. Wade*, 410 U.S. 113 (1973); *see Thornburgh v. American College of Obstetricians and Gynecologists*, ____ U.S. ____, 106 S.Ct. 2169, 2178 (1986) (specifically reaffirming *Roe v. Wade*); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420 (1983) (*Akron*) (similar). The right to choose abortion rather than childbirth is "not unqualified and must be considered against important state interests in regulation." *Roe v. Wade*, 410 U.S. at 154. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. *Maher v. Roe*, 432 U.S. 464, 473-74 (1977).

A state regulation that burdens an individual's right to decide to terminate her pregnancy by substantially limiting her access to the means of effectuating that decision is subject to strict judicial scrutiny. *Carey v. Population Services International*, 431 U.S. 678, 688 (1977). Such a burden is imposed by a regulation that places an obstacle, absolute or otherwise, in the path of one seeking to exercise the protected right. *Maher v. Roe*, 432 U.S. 464, 472 (1977).

The term "undue burden" does not accurately describe the magnitude of interference necessary to trigger heightened judicial scrutiny. The Supreme Court has squarely rejected this analysis as "wholly incompatible with the existence of the fundamental right recognized in *Roe v. Wade*." *Akron*, 462 U.S. at 419-21 n. 1. Indeed, the Court's traditional three tiered constitutional analysis exists to provide the courts a value-neutral framework by which to test the constitutionality of legislative enactments. Determining whether a burden is "undue" as a threshold inquiry would leave available to judges no standard for making this determination but their individual assessment of a statute's worth. *Cf. Mississippi University for Women v. Hogan*, 458 U.S. 713, 724 n. 9 (1982) ("[W]hen a classification expressly discriminates on the basis of gender, the analysis and level of scrutiny applied to determine the validity of the classification do not vary simply because the objective appears acceptable to individual Members of the Court. While the validity and importance of the objective may effect the outcome of the analysis, the analysis itself does not change."). Thus the term "undue burden" as used, for example, in *Maher*, 432 U.S. at 473-74, refers to the ultimate constitutional issue under heightened judicial scrutiny, rather than the threshold requirement for triggering such scrutiny. *Charles v. Carey*, 627 F.2d 772, 777 (7th Cir. 1980); *Planned Parenthood of Rhode Island v. Board of Medical Review*, 598 F. Supp. 625, 630 n. 2 (D.R.I. 1984).

Regulations imposing a constitutionally significant burden on the free exercise of a protected right, including the right to choose to terminate one's pregnancy, must be supported by a compelling state interest. *Akron*, 462 U.S. at 427; *Roe v. Wade*, 410 U.S. at 155. Such a regulation must also be narrowly drawn to express only the legitimate state interests at stake. *Carey v. Population Services International*, 431 U.S. 678, 686, 688 (1977).

Constitutional rights do not mature and come into being only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976) (*Danforth*). *See Bellotti II*,

433 U.S. at 633; *Carey v. Population Services International*, 431 U.S. at 693. Similarly, the burdens imposed by state regulation of abortion are no different for minors than for adults. *Zbaraz v. Hartigan*, 763 F.2d 1532, 1536 (7th Cir. 1985), *appeal docketed*, No. 85-673 (U.S. Oct. 16, 1985); *see Bellotti II*, 443 U.S. at 642 ("[T]he potentially severe detriment facing a pregnant woman is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor."). Therefore, the degree of burden that triggers heightened judicial scrutiny depends in no way upon whether the regulation applies to minor or adult women.

The Supreme Court, however, long has recognized that a State has somewhat broader authority to regulate the activities of children than of adults. *Danforth*, 428 U.S. at 74. This broader authority derives from the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing. Thus the difference between abortion statutes which regulate adults and those which regulate only minors is that the latter may be justified by a significant state interest that is not present in the case of an adult. *Zbaraz v. Hartigan*, 763 F.2d at 1536. *See Akron*, 462 U.S. at 427 n. 10; *Carey v. Population Services International*, 431 U.S. at 693 n. 15; *Danforth*, 428 U.S. at 75. In addition, the State is not constitutionally bound to employ the least burdensome method of effectuating its interests. *Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127, 1133 (7th Cir. 1983) (*Pearson*). *Compare Pearson with Carey v. Population Services*, 431 U.S. at 688 (state regulation burdening the right of adult women to terminate their pregnancies must "be narrowly drawn to express only the legitimate state interests at stake."). Instead, the state regulation must be rationally calculated to serve the state's significant interests. *Planned Parenthood of Rhode Island v. Board of Medical Review*, 598 F. Supp. 625, 640 (D.R.I. 1984).

As immature minors often lack the ability to make fully informed choices that take account of both immediate and

long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interests of the minor. *Bellotti II*, 443 U.S. at 640. Therefore, a State's interest in protecting immature minors will sustain the requirement of consent, either parental or judicial. *Akron*, 462 U.S. at 439. But even the State's interest in encouraging parental involvement in their minor children's decision to have an abortion must give way to the constitutional right of a mature minor or an immature minor whose best inerests are contrary to parental involvement. *Id.* at 427 n. 10; *Planned Parenthood of Rhode Island v. Board of Medical Review*, 598 F. Supp. at 640. *See Bellotti II*, 443 U.S. 649.

Even under the less rigorous standard applicable to regulations burdening the rights of minor women to obtain an abortion, the burden of demonstrating a connection between the regulation and the asserted state policy falls on the state. *Carey v. Population Services International*, 431 U.S. at 696, 696 n. 22; *Pearson*, 716 F.2d at 1133. Neither a bare assertion that the burden is connected to a significant state policy, *Carey*, 431 U.S. at 696, nor sentiment or folklore, *In re Gault*, 387 U.S. 1, 21-22 (1967), will satisfy this burden.

Minnesota Statute § 144.343(2)-(7) requires minors either to notify their parents of their desire to obtain an abortion, or to obtain the judicial waiver of this requirement. The statute does not require parental consent or a waiver of parental consent. The parties agreed in response to a question from the court that the constitutional analysis applicable to notice requirements does not differ from that applicable to consent requirements. Moreover, despite the contrary suggestions of individual Members of the Supreme Court, *see Akron*, 462 U.S. at 469 (O'Connor, J., dissenting); *H.L. v. Matheson*, 450 U.S. 338, 421 (Stevens, J., concurring), the court concludes that it is "parental involvement" that an emancipated or mature minor must have an opportunity to avoid, without regard to whether that "involvement" takes the form of notification or consent. *See Akron*, 462 U.S. at 427 n. 10; *Pearson*, 716 F.2d at 1132. *See also Bellotti II*, 443 U.S. at 647 (statute unconstitutional because, *inter alia*, it failed to provide every minor an opportunity to "go directly to a court without first consulting or notifying her parents").

II. *Minn. Stat. § 144.343(2)*

Subdivision 2 of § 144.343 prohibits performing an abortion upon an unemancipated minor, or upon a woman for whom a guardian or conservator has been appointed because of a finding of incompetency, until at least 48 hours after written notice of the pending operation has been delivered to the minor's parents or guardian or conservator. By its order of July 31, 1981, this court temporarily restrained defendants from enforcing the provisions of Minn. Stat. § 144.343(2) because the court found it probable that plaintiffs would be successful in their challenge to subdivision 2. As a result of this restraining order, subdivision 6 of § 144.343 took effect. This subdivision provides that subdivision 2 shall be enforced as though the judicial bypass provisions of subdivision 6 were incorporated as paragraph c of subdivision 2. Subdivision 6 further provides that if the court's temporary injunction is ever stayed or dissolved, or otherwise ceases to have effect, subdivision 2 shall have full force and effect, without being modified by the addition of the substitute paragraph, and the substitute paragraph shall have no force or effect until or unless an injunction or restraining order is again in effect.

A State choosing to encourage parental involvement in their minor child's decision to have an abortion must provide an alternative procedure through which a minor may demonstrate that she is mature enough to make her own decision or that the abortion is in her best interests. *Akron*, 462 U.S. at 430 n. 10; *see Bellotti II*, 443 U.S. at 643-44. The unique nature and consequences of the abortion decision make it inappropriate "to give a third party an absolute, and possibly arbitrary, veto over the decision of a physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." *Bellotti II*, 443 U.S. at 643; *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976).

The *Bellotti II* court set forth the following requirements:

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.

443 U.S. at 643-44. A statute that fails to provide such an alternative to a consent or notification requirement imposes an undue burden upon the exercise by minors of the right to seek an abortion. *Id.*, at 647.

Without the judicial bypass option of subdivision 6, Minn. Stat. § 144.343(2) would unduly burden the exercise by minors of the right to seek an abortion. There are parents who would obstruct, and perhaps altogether prevent, the minor's efforts to exercise the right. *Bellotti*, 443 U.S. at 647. Young, pregnant minors, especially those living at home, are particularly vulnerable to their parent's efforts to obstruct an abortion. *Id.*; *Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983). The interests of the State and of these parents, must give way to the constitutional right of a mature minor or of an immature minor whose best interests are contrary to parental involvement. *See, e.g., Akron*, 428 n. 10. Therefore, the court concludes that it must permanently enjoin defendants from enforcing Minn. Stat. § 144.343(2) as unmodified by subdivision 6.

III. *Constitutionality of Minnesota's Parental Notification Law*

Plaintiffs contend that Minn. Stat. § 144.343(2)-(7) is unconstitutional as applied because it interferes with and burdens minors in the exercise of their constitutional rights and defendants have failed to demonstrate that the statute is necessary, narrowly drawn, and that it is accomplishing significant state interests. Defendants respond that plaintiffs' position improperly asks this court to disregard controlling Supreme Court precedent. In view of the fact that the relevant legal standards governing the constitutionality of parental notification requirements are not in dispute, *see Akron*, 462 U.AS. at 439, defendants contend that the scope of this court's inquiry properly is restricted to determining whether the statute complies with the guidelines set forth by the *Bellotti II* plurality and subsequently approved by majority of the the Supreme Court in *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476 (1983).

Plainly, it is within neither the power nor the desire of this court to overrule Supreme Court precedent. *E.g., Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983); *Jaffree v. Board of School Commissioners*, 459 U.S. 1314, 1316 (Powell, Circuit Justice 1983). Nevertheless, the court is mindful that:

> Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry . . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.

United States v. Carolene Products Co., 304 U.S. 144, 153 (1938) (Citations omitted); *see New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1260 (3d Cir. 1986). *Compare Wisconsin Action Coalition v. City of Kenosha*, 767 F.2d 1248 (7th Cir. 1985) (ordinance limiting hours of solicitation held invalid) *with City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547 (7th Cir. 1986) (conducting *de novo* analysis of validity of similar ordinance). If the court properly may inquire into whether a change has occurred in the factual basis upon which the constitutionality of a statute depends, then surely an inquiry into the existence of a particular state of facts assumed but never demonstrated is at least equally proper. To this court's knowledge, it is the first ever to examine a parental notification or consent substitute statute in actual operation. *See, e.g., Akron* 462 U.S. 425 (enforcement of ordinance enjoined

before its effective date); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 483 F. Supp. 679, 683, (W.D.Mo. 1980) (statute at issue in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, enjoined on day after becoming effective); *Bellotti II*, 443 U.S. at 645 n. 25 (because appellees successfully sought to enjoin Massachusetts from putting statute into effect, there existed an "absence of any evidence as to the operation of judicial proceedings under § 12s."). Initiation of the factual inquiry mandated by the *Carolene Products* court lies squarely within the province of a federal district court. Therefore, this court heard testimony and has made findings of fact with respect to plaintiffs' allegation that Minn. Stat. § 144.343 (2)-(7) is not rationally related to the State's asserted interests.

Plaintiffs' as applied challenge to the constitutionality of Minn. Stat. § 144.343(2)-(7) proceeded at trial on two levels. Plaintiffs' more limited challenge attached the sufficiency of Minnesota's compliance with the *Bellotti II* guidelines for establishing an alternative procedure whereby authorization for the abortion can be obtained. *See Bellotti II*, 443 U.S. at 643-44. Plaintiffs' broader challenge attacked the assumption, implicit in the *Bellotti II* and *Ashcroft* decisions, that a notification or consent requirement imposed in conjunction with an appropriate alternative bypass procedure would serve the State's interest in protecting pregnant minors without unduly burdening the right of mature or best interests minors to obtain an abortion.

The bulk of the testimony at trial related to whether requiring pregnant minors either to notify their parents of their desire to terminate their pregnancies or to go to court to obtain a waiver of the notification requirement actually furthers the State's interest in protecting pregnant minors. The court heard testimony of at least 37 witnesses who spoke to this issue. Only two of these witnesses related facts and expressed opinions from which a court could draw a reasonable inference that the statute does young women more good than harm. Neither of these witnesses, Dr. Vincent Rue or Dr. Richard T.F. Schmidt, has any direct contact with minors affected by Minn. Stat. § 144.343(2)-(7). Neither witness counsels minors on a regular basis concerning the decision whether to terminate a pregnancy, neither

witness performs abortions, and neither witness sees minors who have had abortions on a regular basis.

Of the remaining witnesses who spoke to the issue whether Minn. Stat. § 144.343 effectuates the State's interest in protecting pregnant minors, all but four of these are personally involved in the statute's implementation in Minnesota. They are judges, public defenders, guardians ad litem, and clinic counselors. None of these witnesses testified that the statute has a beneficial effect upon the minors whom it affects. Some testified the law has a negligible effect upon intra-family communication and upon the minors' decision-making process. Others testified the statute has a deleterious effect on the well-being of the minors to whom it applies because it increases the stress attendant to the abortion decision without creating any corresponding benefit. Thus five weeks of trial have produced no factual basis upon which this court can find that Minn. Stat. § 144.343(2)-(7) on the whole furthers in any meaningful way the state's interest in protecting pregnant minors or assuring family integrity.

The court has considered the possibility that the statute's existence encourages immature, non-best interest minors to tell their parents, and that this intangible effect is not amenable to proof at trial. The court does not believe this to be the case. First, several witnesses who testified at trial were involved in providing abortions to minors both before and after the enactment of Minn. Stat. § 144.343(2)-(7). These witnesses could have testified as to a change in the level of parental participation occurring at about the time of the statute's effective date. Although these and other witnesses testified that a sizable proportion of minors seeking an abortion in Minnesota voluntarily notify at least one parent of their intention, none testified that this proportion changed at or around the effective date of the Minnesota parental notification law.

Furthermore, the testimony indicates that the sort of independent self-assessment by the minor of her own maturity suggested by this scenario actually does not occur as a result of the statute. Although the major abortion providers in Minnesota inquire into a minor's maturity in the course of the informed consent process, abortion providers to not decline to assist

minors because of their immaturity with any frequency. To the contrary, the testimony revealed the major providers tend to resolve any doubts as to a minor's maturity by referring her to the judicial bypass system. These minors are almost universally successful in obtaining judicial waivers. Thus there appears to be little self-selection among those minors who come to the clinics initially without both parents. Instead, any self-selection as to maturity occurring among pregnant minors appears to be a result of the natural maturation process, rather than an effect of Minn. Stat. § 144.343(2)-(7). As described in finding of fact number 65, the desire on the part of minors to retain their privacy with respect to the abortion decision is, at least in part, a result of the maturation process. Therefore, it does not appear Minn. Stat. § 144.343(2)-(7) has any greater beneficial effect upon immature minors than it does upon mature minors and minors whose best interests are not served by notification.

In view of the foregoing, the court finds as a matter of fact that Minn. Stat. § 144.343(2)-(7) fails to serve the State's asserted interest in fostering intra-family communication and protecting pregnant minors. This is not a case in which the State merely has failed to demonstrate that the challenged statute employs the alternative means of effectuating its interest that is least burdensome upon the rights of the affected individuals. *See Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127, 1134 (7th Cir. 1983) (state is not constitutionally required to provide the least burdensome alternative to notification.). Similarly, this is not a case in which the legislature has utilized a yardstick that is imprecise or even unjust in particular cases. *See H.L. v. Matheson*, 450 U.S 398, 425 (1981) (Stevens, J., concurring) (over-inclusiveness of parental-notice requirement does not undercut its validity). Instead, Minn. Stat. § 144.1343(2)-(7) imposes the substantial burden of obtaining a judicial waiver of the parental notification requirement upon a group of minors composed almost entirely of either mature minors or minors whose best interests are not served by notification. This substantial burden is not justified by the state's interests in encouraging intra-family communication and protecting immature minors because Minn. Stat. § 144.343(2)-(7) fails to further either of those interests in any

meaningful way. When, as here, the state's asserted interest fails to justify the burden imposed upon pregnant minors by an abortion regulation, the Supreme Court has invalidated such regulations as unduly burdensome upon the rights of pregnant minors. *Bellotti II* 443 U.S. 622, 651 (1979); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976).

This court does not, however, write on a clean slate in determining the constitutionality of Minnesota's parental notification statute. The Supreme Court carefully delineated the elements of the alternative procedure states must employ if they wish to require parental consent or notification prior to abortion. *Bellotti II*, 443 U.S. at 643-44. Although the Court's discussion of the necessary alternative procedure appears in a plurality opinion and at least arguably was unnecessary to the decision in the *Bellotti II* case, the Supreme Court left no doubt as to its commitment to the *Bellotti II* procedure in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). Noting its statement in *Akron* that the relevant legal standards with respect to parental-consent requirements are not in dispute, 462 U.S. at 439, the Court treated a challenge to the constitutionality of Missouri's consent/bypass statute as an issue purely of statutory construction. *Ashcroft*, 462 U.S. at 491. Because the Missouri statute at issue could fairly be construed to comply with the *Bellotti II* requirements, it avoided any constitutional infirmities. *Id.* at 493.

Because no court has had occasion to consider the actual effect of a consent/bypass or notification/bypass statute in operation, plaintiffs contend the issue now before this court is far more complex than the statutory interpretation issue addressed by the *Ashcroft* court. Indeed, it appears to this court that the prophecy with which Mr. Justice Stevens closed his concurrence in *Bellotti II* is fulfilled.[1] Nevertheless, this court is

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1 In arguing that the *Bellotti II* case presented the Supreme Court no occasion to render an advisory opinion on the constitutionality of the alternative procedure recommended in Justice Powell's plurality opinion, Justice Stevens predicted "a real statute—rather than a mere outline of a possible statute—and a real case or controversy may well present questions that appear quite different from the hypothetical questions Justice Powell has elected to address." 433 U.S. at 656 n.4 (Stevens, J., concurring).

bound by applicable Supreme Court precedent. *E.g. Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 534 (1983); *Jaffree v. Board of School Commissioners*, 459 U.S. 1314 (Powell, Circuit Justice 1983). This court has made factual findings as to the effect of Minnesota's parental notification law as it affected the minors to whom it applied between its effective date in 1981 and trial in 1986. Were this court writing on a clean slate, it could not uphold the constitutionality of Minn. Stat. § 144.343(2)-(7) under the intermediate scrutiny appropriate in challenges to regulations that burden the fundamental rights of minors. But it is not this court's place to determine the assumptions upon which the Supreme Court based its holdings in *Bellotti II* and *Ashcroft*. Nor is it this court's place to determine whether the facts actually demonstrated at trial comport or conflict with any assumptions the Supreme Court may have made. The Supreme Court directs that this court's inquiry be limited instead to an issue purely of statutory construction: whether Minnesota provides a judicial alternative that is consistent with established legal standards. *Ashcroft*, 462 U.S. at 491-92.

Minnesota Statute § 144.343(2)-(7) satisfies these legal standards. The court has found that Minn. Stat. § 144.343(6) correctly directs courts hearing bypass petitions to conduct the inquiry required by the *Bellotti II* court. Although the language of the Minnesota statute with respect to maturity varies slightly from that of the *Bellotti II* decision, the requirement that the woman be "mature and capable of giving informed consent to the proposed abortion" is the functional and legal equivalent of the Supreme Court's requirement that the minor be "mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes." *See Bellotti II*, 443 U.S. at 643.

Arguably, however, the statute's requirement that the court inquire in the case of an immature minor "whether the performance of an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests" differs from the Court's inquiry whether "the desired abortion would be in her best interests." *See id.* at 644. Indeed, testimony indicates that some Minnesota courts consider

whether the abortion itself is in the minor's best interests, while others examine whether avoiding parental involvement in the minor's decision, whatever it may be, is in the minor's best interests. This court, however, perceives that the former inquiry imposes the greater burden upon the minor in terms of what she must demonstrate before proceeding without involving her parents. Because the Supreme Court's language approves the imposition of this more restrictive standard, this court concludes that the practice of some Minnesota courts of interpreting Minn. Stat. § 144.343(6) to require a less intrusive and less burdensome inquiry does not violate the legal standards set forth in *Bellotti II* and approved in *Ashcroft*.

The court further finds that judges who hear the bypass petitions in Minnesota faithfully apply the standards set forth in Minn. Stat. § 144.343(6), and those judges who consider themselves unable to faithfully apply the standard have consistently refused to hear bypass petitions. Furthermore, the court finds that Minnesota courts have established procedures to assure the minors' anonymity, and to expedite both the initial hearing and any subsequent appeal. Finally, the court finds that the delays which do attend the bypass proceedings in practice, although burdensome to minor petitioners, do not reflect a systematic failure to provide a judicial bypass procedure created by Minn. Stat. § 144.343(6), as presently executed by Minnesota courts and the other offices that participate in the bypass proceedings, coplies with the procedural requirements set forth in *Bellotti II* and approved in *Ashcroft*. Therefore, the court must reject plaintiffs' challenge to Minnesota's notification/bypass requirement as a whole.

IV. *Two Parent Notification Requirement*

Subdivision 3 of Minnesota Statute § 144.343 identifies the individuals entitled to notification as "both parents of the pregnant woman if they are both living, one parent of the woman if only one is living or if the second cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one." Plaintiffs contend the statute's two parent notice requirement unduly burdens the exercise by

minors of the right to seek an abortion. The court finds that this requirement places a significant burden upon pregnant minors who do not live with both parents. Particularly in these cases, notification of an abusive, or even a disinterested, absent parent has the effect of reintroducing that parent's disruptive or unhelpful participation into the family at a time of acute stress. Similarly, the two parent notification requirement places a significant obstacle in the path of minors in two parent homes who voluntarily have consulted with one parent but not with the other out of fear of psychological, sexual, or physical abuse toward either the minor or the notified parent. In either case, the alternative of going to court to seek authorization to proceed without notifying the second parent introduces a traumatic distraction into her relationship with the parent whom the minor has notified. The anxiety attending either option tends to interfere with and burden the parent-child communication the minor voluntarily initiated with the custodial parent.

The State has the burden of demonstrating that its interest in encouraging parental consultation justifies the burden imposed upon pregnant minors by the statute's two parent notification requirement. *See, e.g., Carey v. Population Services International*, 431 U.S. 678, 696 n. 22 (1977); *Pearson*, 716 F.2d at 1133. The Supreme Court has concluded that the requirement of obtaining both parent's consent does not unconstitutionally burden a minor's right to seek an abortion "[a]t least when the parents are together and the pregnant minor is living at home." *Bellotti II*, 443 U.S. at 649. When all three live together, both the father and mother have an interest—one normally supportive—in helping to determine the course that is in the best interests of the daughter. *Id.* This court concludes, however, that a regulation requiring notification of both parents even when the nuclear family unit either has broken apart or never formed is not reasonably designed to further the State's interest in protecting pregnant minors.

To the contrary, the court finds that the regulation adversely affects communication voluntarily initiated with one parent in a large number of cases. Indeed, 20 to 25% of minors seeking judicial authorization to proceed with an abortion without parental notification are accompanied to court by one parent,

or at least have obtained the approval of one parent. In these cases the necessity either to notify the second parent despite the agreement of both the minor and the notified parent that such notification is undesirable, or to obtain a judicial waiver of the notification requirement, distracts the minor and her parent and disrupts their communication. Thus the need to notify the second parent or to make a burdensome court appearance actively interferes with the parent-child communication voluntarily initiated by the child, communication assertedly at the heart of the State's purpose in requiring notification of both parents. In these cases, requiring notification of both parents affirmatively discourages parent-child communication. Thus the court concludes that this requirement fails to further the State's interest. Because "state restrictions inhibiting privacy rights of minors are valid only if they serve any significant state interest," *Carey v. Population Services*, 431 U.S. at 693; *Danforth*, 428 U.S. at 75, the court must enjoin defendants from enforcing the two parent notification requirement of Minn. Stat.§ 144.343.

V. *Waiting Period*

Minnesota Statute § 144.343(2) prohibits performing an abortion upon an unemancipated minor until at least 48 hours after written notice of the pending operation has been delivered to the minor's parents. The notice may be delivered personally to the parent by the physician or his agent, or notice may be made by certified mail addressed to the parent at his usual place of abode, with constructive delivery occurring at 12:00 noon on the next day upon which regular mail delivery takes place, subsequent to mailing. Thus minors in Minnesota who choose to notify their parents in writing of their determination to obtain an abortion must wait at least 48 hours, and more commonly approximately 72 hours, between initiating the notification process and the abortion itself.

Lower courts have split on the issue of the constitutionality of mandatory waiting periods imposed upon minor women seeking abortion. Some courts, including this one, have found that a reasonable period of notice is permissible to allow par-

ents to aid, counsel, advise, and assist their minor daughter in connection with the determination to undergo abortion or to provide the physician with information which may be relevant to the medical judgments involved. *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123, 1138-39 (N.D. Ohio 1986); *Hodgson v. Minnesota*, Civ. No. 3-81-538, slip op. at 5 (D. Minn. March 22, 1982). The *Rosen* court concluded that the notification requirement which the Supreme Court explicitly upheld for immature minors in *Matheson* would be an empty formalism with no practical effect if the abortion could proceed before parental consultation could take place. 633 F. Supp. at 1139.

The Seventh Circuit Court of Appeals has invalidated an Illinois statute requiring pregnant minors to wait 24 hours between notifying their parents and obtaining an abortion. *Zbaraz v. Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *appeal docketed*, No. 85-673 (U.S. Oct. 16, 1985). The *Zbaraz* court based its decision upon its conclusion that the mandatory waiting period placed a direct and substantial burden on women who seek to obtain an abortion, and that the waiting requirement did not significantly further the State's interest in promoting consultation when combined with the notification requirement because the notification requirement itself adequately promotes the State's interest. 763 F.2d at 1537-38. The court further concluded that the statutory alternatives to the mandatory waiting period, such as having both parents accompany the minor to the place the abortion will be performed or having both parents submit signed, notarized statements indicating they have been notified, do not redeem the statute. *Id.* at 1538. The Seventh Circuit based its decision in large part upon its prior decision in *Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127 (7th Cir. 1983). There the court upheld a mandatory waiting period to the extent it delayed the abortion for the purpose of effective constructive notice. *Id.* at 1142-43. Requiring delay after notification has been effected, however, is impermissible. *Id.*; *see Zbaraz*, 763 F.2d at 1538.

The Eighth Circuit Court of Appeals three times has affirmed district court decisions that a mandatory 48 hour waiting period, applicable to adult and minor women alike, is unconsti-

tutional. *See Women's Services, P.C. v. Thone*, 690 F.2d 667, 668-69 (8th Cir. 1982), *vacated and remanded for further consideration sub nom. Kerrey v. Women's Services, P.C.*, 462 U.S. 1126 (1983); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 655 F.2d 848, 866 (8th Cir. 1981), *aff'd* 462 U.S. 476 (1983); *Women's Services, P.C. v. Thone*, 636 F.2d 206, 210 (8th Cir. 1980), *vacated for further consideration sub nom. Thone v. Women's Services, P.C.*, 452 U.S. 911 (1981). The state of Missouri did not appeal the Eighth Circuit's decision in *Ashcroft* invalidating the statute's 48 hour waiting period.

This court agrees with the district court for the Northern District of Ohio that a notification requirement would be an empty formalism without practical effect if the abortion could proceed before the parental consultation could take place. *See Rosen*, 633 F. Supp. at 1139. However, the waiting period must effectuate actual consultation without unduly burdening the opportunity of pregnant minors to obtain an abortion. In view of the logistical obstacles facing Minnesota women who live in counties without a regular provider of abortion services, the court believes a 48 hour waiting period is excessively long. Travel to an abortion provider, particularly in winter from a rural area in Minnesota, can be a very burdensome undertaking. A requirement that a minor either bear this burden twice or spend up to three additional days in a city distant from her home cannot be justified by the State's interests in encouraging parental consultation, because a shorter waiting period would effectuate that interest as completely. Therefore, the court concludes that if a minor chooses to notify her parent by certified mail as provided in Minn. Stat. § 144.343(2)(b), the State properly may deem delivery to occur at 12:00 noon on the next day on which regular mail delivery takes place, subsequent to mailing. The State further may impose some reasonable waiting period subsequent to delivery of notification during which consultation may occur. Under conditions presently existing in Minnesota, however, 48 hours is an unreasonable waiting period. Therefore, the court will enjoin defendants from enforcing the 48 hour waiting period imposed by Minn. Stat. § 144.343(2).

VI. *Severability*

Defendants contend that the two parent notification requirement and the 48 hour waiting period, which the court today holds unconstitutional, should be severed from the remainder of Minn. Stat. § 144.343(2)-(7).

Subdivision 7 of Minnesota's parental notification statute provides:

> If any provision, word, phrase or clause of this action or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of this section which can be given effect without the invalid provision, word, phrase, clause or application, and to this end the provisions, words, phrases, and clauses of this section are declared to be severable.

This language clearly evinces the legislature's intent that any unconstitutional portions of Minnesota's parental notification statute amenable to severance should be severed.

Subdivision 7 creates a "presumption of divisibility" and places "the burden . . . on the litigant who would escape its operation." *Carter v. Carter Co.*, 298 U.S. 238, 335 (1936) (Cardozo, J.). *See Regan v. Time, Inc.*, 468 U.S. 641, 643 (1984); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 932 (1983). Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law. *See Regan* 468 U.S. at 653; *Chadha*, 462 U.S. at 932. Severance is improp[illegible], however, if the offending language is "inseparably intertwined" within a subsection of the law. *Women's Services, P.C. v. Thone*, 636 F.2d 206, 210 (8th Cir. 1980), *vacated for further consideration on other grounds sub nom. Thone v. Women's Services P.C.*, 452 U.S. 911 (1982).

The 48 hour waiting period in Minn. Stat. § 144.343(2)-(7) is severable from the remainder of the statute. Excising the words "at least 48 hours after" from subdivision 2 does not disable the statute from reasonably effectuating the legislature's intent.

Accordingly, the court holds that this language is severable from the remainder of Minn. Stat. § 144.343. *See Zbaraz v. Hartigan*, 463 F.2d 1532, 1545 (7th Cir. 1985), *appeal docketed*, No. 85-673 (U.S. Oct. 16, 1985).

The language of subdivision 3 defining "parent" as "both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one" is inseparably intertwined within Minn. Stat. § 144.343(2)-(7). The Minnesota legislature would not have enacted a statute requiring notification of a minor's parents prior to the abortion without identifying the individuals entitled to such notice. More importantly, the remainder of the statute cannot be given effect without the offending language. *See* Minn. Stat. § 144.343(7).

In addition, this court is ill-situated to determine what alternative definition the legislature would employ to remedy the constitutional infirmity identified in this decision. For example, the legislature may determine that requiring notice only to one parent is the functional equivalent of requiring notice to both in families enjoying healthy communication, while requiring notice only to one parent permits the notified parent in an intact but dysfunctional family to exercise his or her judgment concerning the wisdom of notifying the other parent. Alternatively, the legislature may determine that notification of both parents is appropriate when the parents are together and the pregnant minor is living at home. *See Bellotti II*, 443 U.S. at 649. Other options also may suggest themselves to the legislature. Any of these choices, however, would leave Minn. Stat. 144.343 (2)-(7) with little resemblance to the program actually intended by the Minnesota legislature. *See Thornburgh v. American College of Obstetricians and Gynecologists*, ____ U.S. ____, ____, 106 Sup. Ct. 2169, 2181 (1986); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 472 (1983) (O'Connor, J., dissenting). Therefore, the definition of parent contained in Minn. Stat. § 144.343(3) is not severable from the remainder of the statute. The court must enjoin defendants from enforcing Minn. Stat. § 144.343(2)-(7) in its entirety.

ORDER

Upon the foregoing, the evidence presented at trial, the submissions and arguments of the parties, and the record as presently constituted,

IT IS ORDERED That Minn. Stat. § 144.343(2)-(7) be and the same hereby is declared unconstitutional.

IT IS FURTHER ORDERED That the Clerk enter judgment as follows:

> IT IS ORDERED, ADJUDGED, AND DECREED That Minn. Stat. § 144.343(2)-(7) is unconstitutional.

IT IS FURTHER ORDERED That defendants be and the same hereby are permanently enjoined from enforcing the provisions of Minn. Stat. § 144.343(2)-(7).

IT IS FINALLY ORDERED That the following injunction shall issue without security:

> IT IS ORDERED, ADJUDGED, AND DECREED That defendants are permanently enjoined from enforcing the provisions of Minn. Stat. § 144.343(2)-(7).

DATED: November 6, 1986.

Donald D. Alsop //s//
DONALD D. ALSOP
Chief U.S. District Judge

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 86-5423-MN and 86-5431-MN

Jane Hodgson, M.D.; Arthur Horowitz, M.D.; Nadine T., Janet T., Ellen Z., Heather P., Mary J., Sharon L., Kathy M., and Judy M., individually and on behalf of all other persons similarly situated; Diane P., Sarah L. and Jackie H.; Meadowbrook Women's Clinic, P.A., Planned Parenthood of Minnesota, a nonprofit Minnesota corporation; Midwest Health Center for Women, P.A., a nonprofit Minnesota corporation; Women's Health Center of Duluth, a nonprofit Minnesota corporation.

Appellees,

v.

The State of Minnesota; Rudy Perpich as Governor of the State of Minnesota; Hubert H. Humphrey, III, as Attorney General of the State of Minnesota,

Appellants.

Appeal from the United States District Court
for the District of P.A., Minnesota

Argued: June 9, 1987

Filed: August 27, 1987

Before

LAY, *Chief Judge*, Heaney, *Circuit Judge*,
and ROSENN,* *Senior Circuit Judge.*

* Max Rosenn, Senior Circuit Judge, Third Circuit Court of Appeals, sitting by designation.

ROSENN, *Circuit Judge.*

This appeal raises the constitutionality of a Minnesota statute, Minn. Stat. Ann. §§ 144.343(2)-(7) (1987), which requires those providing abortions for minors[1] to give notice of the pending abortion, when possible,[2] to both of the minor's parents at least forty-eight hours before the abortion is to occur. The statute further provides that if the notification requirement is ever restrained or enjoined, as it has been since 1981, then the minor shall have the choice of either notifying both parents forty-eight hours before the abortion or demonstrating to the court in an expedited confidential proceeding either that she is "mature and capable of giving informed consent" or that the performance of an abortion without notification of her parents would be in her best interests.

We conclude that a state may not constitutionally require a minor to notify her parents of her intent to have an abortion without providing the option of an appropriate alternative court procedure by which the minor may demonstrate either her maturity or that the performance of an abortion without notification to her parents would be in her best interests. We further conclude that even where there is the option of such an alternative court procedure, a state may not constitutionally require the minor to always notify *both* of her parents whenever possible, and that this requirement in the present statute is not severable from the remainder of the statute. Accordingly, we will affirm the district court's judgment permanently enjoining the State of Minnesota from enforcing the provisions of Minn. Stat. Ann. §§ 144.343(2)-(7).

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1 Specifically, the statute covers unemancipated minors and women for whom a conservator has been appointed pursuant to state law because of a finding of incompetency. *See* Minn. Stat. Ann. § 144.343(2) (1987) (subd. 2). The statute also contains a number of exceptions, termed "limitations," which we shall discuss further *infra*. For our purposes here, however, we will refer generically to those whom the statute covers as "minors."

2 Again, the specific statutory requisites will be discussed further, *infra*.

I.

In general, Minn. Stat. Ann. § 144.343 provides guidelines for the treatment of pregnancy, venereal disease, alcohol and drug abuse, and abortions for minors. For example, § 144.343(1) (subdivision 1), which is not at issue, provides that a "minor may give effective consent for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse, and the consent of no other person is required." The constitutionality of the remainder of the statute, which deals with abortion treatment for minors, is at issue.

Subdivision 2 (Subd. 2) is a notification provision, and has been under temporary restraint (and later preliminary injunction) since July 31, 1981, the day before it was to go into effect. The measure states that no abortion may be performed "upon an unemancipated minor or upon a woman for whom a guardian or conservator has been appointed . . . until at least 48 hours after written notice of the pending operation has been delivered . . ." to her "parent." It also provides for the mechanics of effecting notice. Subd. 2(a) provides for personal notice by the physician or his agent. In the alternative, subd. 2(b) provides that notice may also be effected "by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee . . . ." If notice is mailed, "[t]ime of delivery [is] deemed to occur at 12 o'clock noon on the next day on which regular mail takes place, subsequent to mailing." Thus, when notice is mailed, as a practical matter the waiting period may become 72 hours. Further, the district court found that in many cases "scheduling factors" may cause the effective length of the delay to reach "a week or more." *Hodgson v. Minnesota*, 648 F. Supp. 756, 765 (D. Minn. 1986).

Parent is defined in subd. 3 as "both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one." Subd. 4 provides

that no notice is required if: (a) the attending physician certifies that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; or (b) the abortion is authorized in writing by the person or persons who are entitled to notice; or (c) the pregnant minor declares that she is a victim of sexual abuse, neglect, or physical abuse as defined in the statute. In the latter case, notice of abuse is to be made to the proper authorities. Although not required, it appears that most or all "abortion providers" require a prior report of abuse before dispensing with notice under subd. 4(c).

Subd. 5 is a penalty provision and subjects anyone performing an abortion in violation of the statute to criminal penalties, and civil liability to any person wrongfully denied notification. Subd. 6 provides that if the notification provision of subd. 2 is ever enjoined by judicial order, as it has been since before its effective date, then during those periods of restraint a pregnant minor has the choice of either providing notice as set forth in subd. 2, or submitting to a "court bypass" procedure. Under the court bypass, a judge after an expedited confidential hearing, may authorize an abortion without parental notice after determining "that the pregnant woman is mature and capable of giving informed consent to the proposed abortion," or that the performance of an abortion without notification would be in her best interests.

The district court made a variety of factual findings with respect to the operation over the past five years of the court bypass procedure contained in subdivision 6. According to the court, confidentiality has generally been maintained. *See Hodgson*, 648 F. Supp. at 763. Further, proceedings have generally been expedited, so that minors have only had to wait two or three days between their first contact with the court and the hearing on their petitions. *Id.* at 762-763. Thus, as with the notification delay, total delay (including scheduling problems) has been "a week or more." *Id.* at 763. This can increase both the cost and risk of an abortion. Further, the system frequently requires the pregnant minor to make two or three trips of often great distances, *see id.* at 761, which may in part be because by the time the court proceeding is over, it is too late in the day to still have the abortion. Judges have almost never denied a

minor a requested abortion; there were only nine instances, several of which were apparently justified (e.g., minor didn't really want an abortion/changed her mind), and one of which was reversed on appeal. *See id.* at 765. The district court also found that the whole process produced a great deal of stress, and concluded that were the court writing on a clean slate it would have found the burdens greater than the benefits, of which the court found none. *See id.* at 775-76. The asserted benefit or purpose of the statute, as in part expressed at oral argument before this court, is to foster intra-family communication and to protect pregnant minors, by promoting parental involvement in the minor daughter's abortion decision.

The final provision in the statute, subd. 7, is a severability provision. It provides that if any part of the statute is held invalid, such invalidity should not affect any portion of the statute which can be given effect without the invalid portion.

The statute was to become effective on August 1, 1981. On July 30, 1981, however, the plaintiffs, class action minors, a parent, four clinics, and two physicians, brought suit seeking a declaratory judgment and an injunction. The plaintiffs alleged: (1) that the statute violated due process on its face and as applied; (2) that the statute violated equal protection; (3) that as applied to estranged families the statute violated the due process and first amendment rights of custodial parents; and (4) that the statute violated various provisions of the Minnesota constitution.

On July 31, 1981, the district court temporarily restrained enforcement of subd. 2 of the statute (the pure notice provision), but not subd. 6. On March 2, 1982, the court issued a preliminary injunction against enforcement of subd. 2.

On January 23, 1985, the district court granted partial summary judgment in the defendant's favor on the plaintiffs' state constitutional, equal protection, and facial due process claims against continued enforcement of the "notice/bypass" procedure, and accordingly dismissed those claims. Then, on November 6, 1986, after a lengthy trial, the court held, *inter alia*, that: (1) the notification requirement, standing alone, was facially invalid; (2) the notice/bypass requirement was facially invalid to the extent it required a 48 hour waiting period instead of

some shorter period, and notification of both parents; (3) the 48 hour waiting period requirement was severable; (4) the two-parent notification requirement was not severable; (5) an "as applied" analysis of the notice/bypass procedure was barred by Supreme Court precedent; and (5) if an "as applied" analysis had not been barred, the district court would have found the statute unconstitutional as applied because it failed to serve the state's asserted interests. Both sides appeal.

II.

Plaintiffs first seek to keep permanent the current injunciton against the enforcement of subd. 2. They argue that subd. 2 is unconstitutional on its face, becuase it fails to afford mature minors and minors whose best interests are contrary to parental involvement, with an opportunity to obtain a judicial or administrative waiver of the notification requirement. We agree.

It is by now well established that, in general, any regulation restrictive of a woman's right to choose an abortion must be justified by a "compelling" state interest; *See Thornburgh v. American College of Obstetricians and Gynecologists*, 54 U.S.L.W. 4618, 4621 (U.S. June 11, 1986); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 427 (1982); *Roe v. Wade*, 410 U.S. 113, 155 (1972). Where minors are involved, however, the State has somewhat broader authority to regulate, and thus need only demonstrate a "significant" state interest. *See Akron*, 462 U.S. at 427-28 n.10; *Carey v. Population Serv. Int'l*, 431 U.S. 678, 693 & n.15 (1976); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 74-75 (1975). Accordingly, the Supreme Court has repeatedly held that states may, in certain circumstances, permissibly encourage parental involvement in a minor's decision to have an abortion. *See Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-91 (1982) (plurality portion of opinion); *Akron*, 462 U.S. at 427-28 n.10, 439; *H.L. v. Matheson*, 450 U.S. 398, 409 (1980); *Bellotti v. Baird*, 443 U.S. 622, 640, 648 (1978) (plurality opinion) (*Bellotti II*); *Danforth*, 428 U.S. at 75.

Nevertheless, the State's right to regulate the activities of minors is not absolute. *See Danforth*, 428 U.S. at 74; *Wynn v. Carey*, 582 F.2d 1375, 1386 (7th Cir. 1978). *See also Bellotti II*, 443 U.S. at 642 (The potentially severe detriment facing a pregnant woman is not mitigated by her minority. "Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor."). For example, the Supreme Court has squarely held that "the State may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of pregnancy." *Danforth*, 428 U.S. at 74. Rather, at least in consent cases, "[i]t is clear . . . that 'the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests.' " *Ashcroft*, 462 U.S. at 491 (quoting *Akron*, 462 U.S. at 439-40). *See Bellotti II*, 443 U.S. at 643-44, 647-48. The rationale for requiring this alternative procedure is clear: the State's "significant" interest in encouraging parental involvement in a minor's abortion decision "must give way to the constitutional right of a mature minor or of an immature minor whose best interests are contrary to parental involvement." *Akron*, 462 U.S. at 428 n.10.

In *Bellotti II, supra*, the Supreme Court's plurality opinion specifically reached the question of notice (as opposed to consent) in the context of a statute which required that an unmarried minor's parents be notified whenever the minor child, as an alternative to obtaining her parents' consent, sought court permission to have an abortion. The Supreme Court struck down the notice requirement, stating that such a requirement "would impose an undue burden upon the exercise by minors of the right to seek an abortion." *Id.* at 647. According to the Court, there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court.

> There is no reason to believe that this would be so in the majority of cases where consent is withheld. But many

parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court. It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most.

We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity—if she so desires—to go directly to a court without first consulting *or notifying* her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act *without parental consultation* or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion.

Id. at 647-48 (emphasis added). *See Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985), *review granted*, 55 U.S.L.W. 3247 (U.S. Oct. 14, 1986); *Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983); *Planned Parenthood of Rhode Island v. Board of Medical Review*, 598 F. Supp. 625, 634 (D.R.I. 1984). *Cf. H.L. v. Matheson*, 450 U.S. at 406-07 (As applied to an unemancipated minor girl living with and dependent upon her parents, and making no claim or showing as to her maturity or as to her relationship with her parents, parental notification requirement is constitutional); *American College of Obstetricians v. Thornburgh*, 656 F. Supp. 879, 882-84 (E.D. Pa. 1987) (distinguishing statute which gives parents with notice right to observe judicial proceedings from statute which would give parents notice) (judgment on remand from Supreme Court).

Despite the above Supreme Court rulings, none of which has ever sanctioned either a blanket consent or a blanket notice requirement, the defendants urge that no Supreme Court

majority opinion has ever squarely extended the blanket consent proscription to a blanket notice requirement.[3] According to the defendants, a notice requirement is less burdensome than a consent requirement, and is therefore a constitutional means of furthering the State's significant interest in encouraging parental involvement in a minor's abortion decision. We disagree.

We believe that both parental consent and notice requirements are burdensome to a pregnant minor. Although a notice requirement does not, as in a consent statute, enable the parent to exercise an absolute and unilateral veto regardless of the best interests of the minor, it does add to the minor's burdens at a time when she is confronted with a major personal decision of "grave and indelible consequences." *Bellotti II*, 443 U.S. at 642. First, there is the waiting period that is required until the blanket statutory notice is given. "[T]he abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences." *Id.* at 643. Second, such a blanket requirement, particularly when the minor is mature and in situations where notice to her parents would not be in her best interests, may do more to fractionalize the family integrity than preserve it, and may be adverse to the best interests of the pregnant minor. There is no reason to believe that parents who refuse to consent to an abortion will be less obstructive to such a medical procedure or to the minor's access to the court bypass procedure when they are merely notified of the pending abortion, regardless of the maturity of the minor or her ability to make an intelligent assessment of her circumstances with the advice of her physician. *See Bellotti II*, 443 U.S. at 647.

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3 *Bellotti II* was only a plurality opinion. However, the four concurring members of the Court would have gone further than the plurality and held any veto power over a minor's abortion decision to be unconstitutional. *See Bellotti II*, 443 U.S. at 652-56 (Stevens, J., concurring). H.L. v. Matheson, though a majority opinion, technically never reached the question of whether it would be constitutional to apply a notice requirement to mature, emancipated, or "non-best interest" minors. *Ashcroft*, *Akron*, and *Danforth* each dealt with a requirement that minors obtain parental consent; none dealt with a notification requirement.

Testimony by experts whom the trial court evaluated as credible and of unquestionably high standing in their respective fields agreed that although family relationships benefit from voluntary and open communication, compelling parental notice has an opposite effect. It is almost always disastrous. Clinic counselors with extensive experience counseling minors in Minnesota supported this view. There was evidence that the law did not promote family integrity or communication; on the contrary, it disrupted and damaged family relationships. The district court found that the defendants offered no persuasive testimony to the contrary. *Hodgson v. State of Minnesota*, 648 F. Supp. at 768. Accordingly, we hold that Minnesota may not constitutionally require a minor to notify her parents of her intent to have an abortion without providing the option of an alternative court procedure by which the minor may demonstrate either her maturity or that the performance of an abortion interests.

III.

A.

Minn. Stat. Ann. § 144.343(3) (1987) (subd. 3) defines "parent" as "both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator of the pregnant woman has one." The plaintiffs claim that this provision is unconstitutional because, at least where the minor does not live with both parents, the statute unduly burdens the minor's exercise of her right to seek an abortion. The defendants, on the other hand, claim that the two-parent notification requirement is constitutional, and that even if it were not, the statute as a whole is constitutional because under subdivision 6 the pregnant minor retains the option of having her abortion authorized by the court. It is to these opposing claims which we now turn.

1.

In *Bellotti II*, the Supreme Court's plurality opinion upheld a requirement that a pregnant minor seeking an abortion obtain both parents' consent, but explicitly left open the question of whether such a requirement would be constitutional where both parents were not residing together and living at home with the minor. According to the Court plurality:

> We are not persuaded that, as a general rule, the requirement of obtaining both parents' consent unconstitutionally burdens a minor's right to seek an abortion. The abortion decision has implications far broader than those associated with most other kinds of medical treatment. *At least when the parents are together and the pregnant minor is living at home*, both the father and mother have an interest—one normally supportive—in helping to determine the course that is in the best interests of a daughter. Consent and involvement by parents in important decisions by minors long have been recognized as protective of their immaturity.

Id. at 649 (emphasis added). Our task is to determine whether these same interests are served by a requirement that a pregnant minor seeking an abortion notify even a non-custodial parent who is no longer, and perhaps never was, living at home as a part of the "family unit."[4]

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4 By phrasing the issue in this way, we do not mean to suggest that it would be constitutional to carve out of a two-parent notification requirement only non-custodial parents not living at home. Rather, we discuss such parents here because subd. 3 requires that they be notified, and because we conclude that this is unconstitutional. It is conceivable to us that a requirement that others be notified, such as parents with joint custody who do not live with the minor most of the time or at the time she learns of her pregnancy, might be unconstitutional as well. We do not, however, decide this issue. Further, we note in passing that Justice Powell's plurality opinion in *Bellotti II* is the only Supreme Court decision to reach the two-parent requirement, and that the plurality's discussion on this point does not appear to have been necessary to its decision. *See Bellotti II*, 443 U.S. at 656 n.4. ("A real statute—rather than a mere outline of a possible statute—and a real case or

In making his findings of fact, Judge Alsop, in a careful and thorough opinion, specifically discussed the high incidence of divorce, and the effect this often has on family communication. According to the district court, approximately 50% of all marriages in Minnesota end in divorce, and approximately 42% of all minors in Minnesota do not live with both biological parents. *Hodgson*, 648 F. Supp. at 768. Further, the district court found that many minors in Minnesota who are victims of dysfunctional families "live in fear of violence by family members." Parental notification of a pending abortion can only add to the magnitude of the problem of family violence which in turn intensifies the distress and anxieties of the abortion decision confronting the pregnant minor. *Id.* at 768-69.[5] Most particularly, the court noted:

> Divorce or separation usually impairs family communication severely. The non-custodial parent often has very little communication with the child. In addition, communication between divorced or separated spouses frequently is marked with the kind of hostility and angry vindictiveness that characterized the divorce or separation.
>
> The effect of compelling an adolescent to share information about her pregnancy and abortion decision with both parents in a divorced or separated situation can be harmful. The non-custodial parent often will reintegrate with the family in a disruptive manner. The adolescent may be perplexed as to why the non-custodial parent should become an important factor in her life at this point, especially when the parent previously has paid her little attention and offered little support. Moreover, the testi-

controversy may well present questions that appear quite different from the hypothetical questions MR. JUSTICE POWELL has elected to address.") (Stevens, J., concurring). Accordingly, in view of our disposition of this appeal, we decline to rule definitively on the constitutionality of requiring that both parents be notified when the parents reside together and the minor is living at home.

5 The district court also noted that the incidence of violence in dysfunctional families is severely underreported. *Hodgson*, 648 F. Supp. at 768-69.

> mony revealed no instances in which beneficial relations between a minor and an absent parent were reestablished following required notification . . . .
>
> Involuntary involvement of the second biological parent is especially detrimental when the minor comes from an abusive, dysfunctional family. Notification of the minor's pregnancy and abortion decision can provoke violence, even where the parents are divorced or separated. Studies have shown that violence and harassment may continue well beyond the divorce, especially when children are involved.

Id. at 769.[6] Finally, the court found that of the twenty to twenty-five percent of minors going to court who voluntarily notified one but not both parents, "the vast majority" told divorced or separated mothers who had not seen their spouses in years, and that minors who ordinarily would notify one parent might be dissuaded from doing so by the two-parent requirement. *Id.* We conclude that these findings are supported by the record and are not clearly erroneous.

Based on the above findings of fact, the district court concluded that "the need to notify the second parent or to make a burdensome court appearance actively interferes with the parent-child communication voluntarily initiated by the child, communication assertedly at the heart of the State's purpose in requiring notification of both parents. In these cases, requiring notification of both parents affirmatively discourages parent-

6 For example, in one instance a non-custodial father called the Meadowbrook Clinic on the morning of his daughter's proposed abortion, and told the Clinic's administrator that he was anti-abortion and planned to stop the abortion from happening. The administrator told him he could not stop the abortion, but then told the mother, who was there at the time, that the clinic could not perform the abortion until things "calmed down." The mother responded that the clinic should not worry because she would "take care of it," and then proceeded to drive to the father's house and shoot a bullet from her gun through his door. Afterwards, the mother returned to the clinic stating, "he will not bother you again." Dr. Lenore Walker, one of the plaintiffs' expert witnesses, testified that pregnancy of a daughter or of a wife triggers violent reactions in abusive dysfunctional families "like a red cape to a bull."

child communication." *Id.* at 778. Thus, held the court, "this requirement fails to further the State's interest." We agree.

As extensively detailed by the district court and noted above, the effect of notifying an absent non-custodial parent of his or her minor daughter's decision to have an abortion is frequently negative for all concerned. Indeed, the problems which inevitably arise when two divorced parents both attempt to raise and influence the same minor child are often a primary reason that courts decline to award joint custody.[7] Thus, unless some other arrangement is made, where the court awards sole custody to one parent, that parent

> has the right to make decisions about the child's education, religious training, residence, and medical treatment. Generally, this parent also has "physical" or "actual" custody which entitles her to control the child's daily activities such as sleeping, eating, and recreation. *The rights and obligations of the non-custodial parent are a good deal more limited. Typically, that parent loses all power with respect to major decisions.* The non-custodial parent's influence over day-to-day childrearing activities is limited to the period of visitation, and visitation itself is frequently confined to a brief time.

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7 *See, e.g.*, Chapman v. Chapman, 352 N.W.2d 437 (Minn. App. 1984), in which the Minnesota trial court had granted joint legal custody in the hope that it would encourage the parents to cooperate. The court of appeals rejected this rationale for awarding joint custody, stating:

> Instead of granting joint custody because the parties *can* cooperate and amicably settle disputes about the children, the judge granted joint custody because they *cannot*. Although ideally the parents should make major decisions concerning their children jointly, joint legal custody should not be used as a "legal baseball bat" to coerce cooperation, as advocated by the father's attorney.
>
> The record shows that the parents have basic differences concerning the health care, religious training and general upbringing of their children. They have not been able to communicate or cooperate in resolving their differences. Joint custody would only exacerbate the problem by dividing authority and increasing opportunities for conflict.

Id. at 441 (emphasis in original).

Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 Yale L. J. 757, 808 (1985) (emphasis added; footnote omitted). *See* J. Goldstein, A. Freud & A. Solnit, *Beyond the Bests Interests of the Child* 38 (1973).

To be sure, in some instances the absent non-custodial parent's advice may be important, helpful, and desirable, and a two-parent notification requirement does, in those cases, further the state's significant interest in promoting intra-family communication. The problem, however, is that the occasions on which the State's interests are furthered are simply too infrequent to justify the burden imposed—particularly where the court has explicitly awarded custody to one parent instead of another. Indeed, one of the prerogatives of being the custodial parent is deciding, in conjunction with the child, when and whether to tell the non-custodial parent about decisions which may affect the child's well-being. *See* Wexler, *supra*; J. Goldstein, A. Freud & A. Solnit, *supra*. Further, even in the absence of a two-parent notification requirement there is certainly nothing to prevent a custodial parent from consulting, or encouraging the minor to consult, the non-custodial parent. *See* J. Goldstein, A. Freud & A. Solnit, *supra*. Accordingly, we conclude that because it frequently does more harm than good, on balance the present statute fails to further the State's asserted interests and is therefore unconstitutional.

2.

We now turn to the question of whether, notwithstanding our conclusion that it is unconstitutional to require absent non-custodial parents to be notified of their minor daughter's abortion decision, the present statute is nevertheless saved by the presence in the statute of an alternative court bypass procedure. In this respect, we note initially that after the plurality in *Bellotti II* suggested it would approve two-parent notification requirements where the parents are together and the minor is living at home, the plurality stated that, "[a]s every pregnant minor is entitled in the first instance to go directly to the court for a judicial determination without prior parental notice, consultation, or consent, the general rule with respect to parental

consent does not unduly burden the constitutional right."[8] *Bellotti II*, 443 U.S. at 649. Nevertheless, we conclude that where, as in this case, the underlying notification requirement impermissibly burdens the minor's abortion decision, that requirement cannot be saved by the presence in the statute of an alternative court bypass procedure.

Our reasons for this conclusion are twofold. The first and most fundamental reason for our conclusion is that the court bypass procedure itself constitutes a burden on the minor's exercise of her right to have an abortion. *See Harris v. McRae*, 448 U.S. 297, 316 (1980) (impliedly recognizing that any state regulation which places an obstacle, absolute or otherwise, in the path of a woman's fundamental right to proceed with an abortion, is a burden); *Maher v. Roe*, 432 U.S. 464, 472-74 (1977) (same). *See also Danforth*, 428 U.S. at 74 ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."). Where the bypass procedure is instituted as an alternative to an otherwise valid parental notification or consent requirement, this burden is justified by the state's significant interest in fostering intra-family communication and protecting minors through parental involvement in the abortion decision. Indeed, where a state chooses to impose an otherwise valid consent or notification requirement upon minors, it *must* also provide an alternative court procedure. *Ashcroft*, *supra*; *Akron*, *supra*; *Bellotti II*, *supra*. Where the underlying notification provision is unconstitutional because with respect to children of broken families it fails to further the state's significant interests, however, a mature minor or minor whose best interests are contrary to notifying the non-custodial parent is forced to either suffer the unconstitutional requirement or submit to the burdensome court bypass procedure.

8 Indeed, in a footnote the plurality recognized that "[t]here will be cases where the pregnant minor has received approval of the abortion decision by one parent." According to the plurality, "[i]n that event, the parent can support the daughter's request for a prompt judicial determination, and the parent's support should be given great, if not dispositive weight." See *Bellotti II*, 443 U.S. at 649 n.29.

Such a Hobson's choice fails to further any significant interest. Just as there must be a constitutional judicial alternative to a notice requirement, so there must be a constitutional notice or consent alternative to the court bypass.[9]

The second reason for our conclusion that the court bypass procedure does not save the two-parent notification requirement is that where the parents are divorced, the minor and/or custodial parent, and not a court, is in the best position to determine whether notifying the non-custodial parent would be in the child's best interests. *See* J. Goldstein, A. Freud & A. Solnit, *supra*. In situations where the minor has a good relationship with the non-custodial parent but the custodial parent does not, there is nothing to prevent the minor from consulting with the non-custodial parent if she so desires. The minor and custodial parent, however, by virtue of their major interest and superior position, should alone have the opportunity to decide to whom, if anyone, notice of the minor's abortion decision should be given. *See id*. Accordingly, we conclude that the unconstitutional notice provisions in Minn. Stat. Ann. §§ 144.343(2)-(7) are not saved by the presence in the statute of an alternative court bypass procedure.

B.

Finally, we must reach the question of whether the two-parent notification provision is severable from the remainder of the statute. In this regard, we recall that subd. 7 provides for severability where the valid portions of the statute "can be given effect without the invalid provision," and therefore creates a presumption of severability. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock*, 55 U.S.L.W. 4396, 4398 (U.S. March 25, 1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108

9 Indeed, the defendants conceded at oral argument before this court that they could not constitutionally strip Minn. Stat. Ann. §§ 144.343(2)-(7) of all but the court bypass procedure. This concession is flatly inconsistent with the defendant's claim that the statute's unconstitutional notification requirement is saved by the court bypass procedure.

(1976) (per curiam), and *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932)). *Accord Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion). Severance is improper if the offending language is "inseparably intertwined within a subsection of the law." *Women's Services, P.C. v. Thone*, 636 F.2d 206, 210 (8th Cir. 1980), *vacated for further consideration sub nom. Thone v. Women's Services, P.C.*, 452 U.S. 911 (1981).

In the case of the present statute, the defendants urge us to sever the two-parent notification requirement in such a way as to make it a single parent notification requirement. In particular, they urge us to make singular the few references to the word "parent" which are in the plural, and to modify by excision the definition of parent in subd. 3 by removing the phrases, "both parents of the pregnant woman if they are both living," and "if only one is living or if the second one cannot be located through reasonably diligent effort." So modified, "parent" would be defined as "one parent of the pregnant woman or the guardian or conservator if the pregnant woman has one."

The problem with the defendants' suggestion is that even so modified portions of the statute cannot be given meaning. For example, subd. 5 provides that "[p]erformance of an abortion in violation of this section . . . shall be grounds for a civil action by a person wrongfully denied notification." If the statute were modified to require notification of only one parent, then it would be impossible to determine which of the two parents would have a cause of action. This would be particularly difficult where both parents are residing together and the pregnant minor is living at home.

Further, such a "radical dissection" would leave Minn. Stat. Ann. §§ 144,341(2)-(7) "with little resemblance to that intended," *Thornburgh*, 54 U.S.L.W. at 4623, by the Minnesota legislature. *See Akron*, 462 U.S. at 446 n.37. As the course of this litigation demonstrates, the Minnesota legislature clearly intended to require notification of both parents whenever possible and constitutional. Indeed, Senator Waldorf, one of the authors of the bill, specifically stated during a hearing before the Minnesota Legislative Committee on Health, Welfare and Corrections that "parent" was intended to mean both parents

even when the parents were divorced and that he believed it would be constitutional to go this far.[10] If, however, as *Bellotti II* suggests, requiring notification of both parents is constitutional where both parents are residing together and the pregnant minor is living at home, then the modification which the defendants suggest would be far more drastic than necessary to make the statute constitutional. As the district court noted, "this court is ill-suited to determine what alternative definition the legislature would employ to remedy the constitutional infirmity in this decision." *Hodgson*, 648 F. Supp. at 780-81. The job of rewriting Minn. Stat. Ann. §§ 144.343(2)-(7) must, therefore, fall to the Legislature, and not to the courts. Accordingly, we conclude that the two-parent notification requirement cannot be severed.

IV.

In summary, we hold that a State may not constitutionally require a minor to notify her parents of her intent to have an abortion without providing the option of an appropriate alternative court procedure by which the minor may demonstrate either her maturity or that the performance of an abortion without notification to her parents would be in her best interests. We further hold that even where there is the option of such an alternative court procedure, a State may not constitutionally require the minor to always notify *both* of her parents whenever possible, and that this requirement in the present statute is not severable from the remainder of the statute. Accordingly, the district court's judgment permanently enjoining the State of Minnesota from enforcing the provisions of Minn. Stat. Ann. § 144.343(2)-(7) will be affirmed.

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10 According to Senator Waldorf, "what we're trying to do is to make the bill constitutional. I am not aware of any [C]ourt decisions, [S]upreme [C]ourt decisions that would not give status to the natural parent who is divorced."

HEANEY, Circuit Judge, concurring.

I concur in the opinion insofar as it holds unconstitutional the Minnesota statute which requires a pregnant minor seeking an abortion to notify a noncustodial parent who is no longer living at home at least forty-eight hours before the abortion. I do so for the reason noted by Judge Alsop in his opinion and quoted on pages 16 and 17 of this opinion. I also agree that the "two parent" requirement cannot be saved by the presence in the statute of the court bypass procedure. Finally, I agree that we cannot sever the two-point notification in such a way as to make it a single parent notification requirement. It is for the legislature to make that change.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-5423 and 86-5431

Jane Hodgson, et al.,

Appellees,

v.

The State of Minnesota, et al.,

Appellants.

On Petition for Rehearing En Banc
Filed: December 31, 1987

The panel's order of November 13, 1987, vacating the judgment and opinion in the above-entitled case is hereby rescinded. The panel reinstates the opinion and judgment of the court.

The petition for rehearing by the court en banc is granted; the panel opinion and judgment entered thereon are vacated. The case shall be argued to the court of appeals en banc and submitted on original briefs and record on February 12 at 9:00 a.m. in St. Paul, Minnesota, in the court of appeals Courtroom No. 1, 584 Federal Courts Building, 316 North Robert Street. Each side will be given 30 minutes for oral argument. Additional citations may be submitted to the court under Fed. R. App. P. 28 (j).

A true copy.

Attest:

/s/ ROBERT D. ST. VRAIN

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5423
No. 86-5431

Jane Hodgson, M.D.; Arthur Horowitz, M.D.; Nadine T., Janet T., Ellen Z., Heather P., Mary J., Sharon L., Kathy M., and Judy M. individually and on behalf of all other persons similarly situated; Diane P., Sarah L. and Jackie H.; Meadowbrook Women's Clinic, P.A., Planned Parenthood of Minnesota, a nonprofit Minnesota corporation; Midwest Health Center for Women, P.A., a nonprofit Minnesota corporation; Women's Health Center of Duluth, P.A., a nonprofit Minnesota corporation,

Appellees,

v.

The State of Minnesota; Rudy Perpich as Governor of the State of Minnesota; Hubert H. Humphrey, III, as Attorney General of the State of Minnesota,

Appellants.

Appeals from the United States District Court
for the District of Minnesota.

Submitted: February 12, 1988 Filed: August 8, 1988

Before

LAY, Chief Judge, HEANEY, MCMILLAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL and BEAM, Circuit Judges, En Banc.

JOHN R. GIBSON, Circuit Judge.

The issue before us is the constitutionality of a Minnesota statute which requires a pregnant minor to notify her parents of her desire to obtain an abortion or to seek judicial bypass. The statute, Minn. Stat. Ann. §§ 144.343(2)-(7) (1987), requires a minor to notify both parents at least forty-eight hours before a planned abortion or demonstrate to a court in an expedited confidential proceeding either that she is "mature and capable of giving informed consent" or that the performance of an abortion without such notification would be in her "best interests." The district court held that the notice/bypass statute was unconstitutional because the two-parent notice requirement failed to serve the state's interest in protecting pregnant minors or promoting family communication and that the 48-hour waiting period requirement was unreasonable under conditions existing in Minnesota. A panel of this court affirmed the judgment of the district court and we granted rehearing en banc. We now reverse and remand with directions that the district court enter judgment that the notice/bypass statute is constitutional.

In 1981, the Minnesota legislature enacted Minn. Stat. Ann. § 144.343, which deals generally with minor's consent to treatment for pregnancy, venereal disease, and alcohol and drug abuse.[1] Subd. 2 provides that no abortion may be performed upon an unemancipated minor until at least 48 hours after written notice to her parent[2] and provides the mechanics for effecting notice.[3] Subd. 6 provides that if the notification provision

1 Only the constitutionality of the portion of the statute dealing with abortions for minors is at issue.

2 Subd. (2) provides:

> [N]o abortion operation shall be performed upon an unemancipated minor • • • until at least 48 hours after written notice of the pending operation has been delivered in the manner specified in subdivisions 2 to 4.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5423
No. 86-5431

Jane Hodgson, M.D.; Arthur Horowitz, M.D.; Nadine T., Janet T., Ellen Z., Heather P., Mary J., Sharon L., Kathy M., and Judy M. individually and on behalf of all other persons similarly situated; Diane P., Sarah L. and Jackie H.; Meadowbrook Women's Clinic, P.A., Planned Parenthood of Minnesota, a nonprofit Minnesota corporation; Midwest Health Center for Women, P.A., a nonprofit Minnesota corporation; Women's Health Center of Duluth, P.A., a nonprofit Minnesota corporation,

Appellees,

v.

The State of Minnesota; Rudy Perpich as Governor of the State of Minnesota; Hubert H. Humphrey, III, as Attorney General of the State of Minnesota,

Appellants.

Appeals from the United States District Court
for the District of Minnesota.

Submitted: February 12, 1988 Filed: August 8, 1988

Before

LAY, Chief Judge, HEANEY, MCMILLAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL and BEAM, Circuit Judges, En Banc.

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of subd. 2 is restrained by judicial order, which as we will discuss occurred here, then a pregnant minor has the choice of either providing notice as set forth in subd. 2, or submitting to a "court bypass" procedure.[4] Under the court bypass, a judge, after an expedited confidential hearing, may authorize an abortion without parental notice after determining "that the pregnant woman is mature and capable of giving informed consent," or that the performance of an abortion without notification would be in her "best interests." "Parent" is defined

parent with return receipt requested and restricted delivery to the addressee * * *." If notice is mailed, "[t]ime of delivery [is] deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing."

4 Subd. 6 provides:

If subdivision 2 of this law is ever temporarily or permanently restrained or enjoined by judicial order, subdivision 2 shall be enforced as though the following paragraph were incorporated as paragraph (c) of that subdivision; provided, however, that if such temporary or permanent restraining order or injunction is ever stayed or dissolved, or otherwise ceases to have effect, subdivision 2 shall have full force and effect, without being modified by the addition of the following substitute paragraph which shall have no force or effect until or unless an injunction or restraining order is again in effect.

(c)(i) If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.

(ii) Such a pregnant woman may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court appointed counsel, and shall, upon her request, provide her with such counsel.

(iii) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the

in subd. 3 as "both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one." Subd. 5 is a penalty provision and subjects anyone performing an abortion in violation of the statute to criminal penalties and civil liability. The statute also provides exceptions to the notice requirement[5] as well as a severability provision.[6]

The statute was to become effective on August 1, 1981. On July 30, 1981, this action seeking declaratory and injunctive relief was brought by a group including: six class-action minors seeking abortions who claimed to be mature and that notification of one or both of their parents of their desire to have an

best interests of the pregnant woman. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions.

(iv) An expedited confidential appeal shall be available to any such pregnant woman for whom the court denies an order authorizing an abortion without notification. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant woman at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant woman 24 hours a day, seven days a week.

5 Subd. 4 provides that no notice is required if:

(a) The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; or

(b) The abortion is authorized in writing by the person or persons who are entitled to notice; or

(c) The pregnant minor woman declares that she is a victim of sexual abuse, neglect, or physical abuse as defined in section 626.556. Notice of that declaration shall be made to the proper authorities as provided in section 626.556, subdivision 3.

6 Subd. 7 provides that if any [part of the statute] is held invalid, such invalidity should not affect any portion of the statute which can be given effect without the invalid portion.

abortion would not be in their best interests; a mother of one of the minor plaintiffs alleging that notification of the father was not in the minor's best interests; and four clinics and two physicians performing abortions in Minnesota.

The district court temporarily restrained enforcement of subd. 2 of the statute (the pure notice provision) on July 31, 1981, but denied injunctive relief as to subd. 6 (the notice/bypass provision).[7] Later, the district court granted partial summary judgment for the defendants by dismissing the plaintiffs' state constitutional claims and by ruling that, on its face, the judicial bypass procedure in subd. 6 did not violate the equal protection and due process rights of pregnant minors. The court concluded, however, that plaintiffs should have the opportunity of a trial to prove their allegations that subd. 6 was being applied unconstitutionally.

After a trial lasting five weeks, the district court held that the notification requirement of subd. 2 without judicial bypass was unconstitutional. *Hodgson v. Minnesota*, 648 F. Supp. 756, 773 (D. Minn. 1986), *cert. denied*, 107 S. Ct. 1333 (1987). While the court found that the notice/bypass requirement, as a whole, was not supported by factual findings that it furthered in any meaningful way the state's interest in protecting pregnant minors or assuring family integrity, the court concluded that it complied both on its face and in actual practice with standards established by the Supreme Court. *Id.* at 773-77. The district court then considered in isolation the two-parent notification and the 48-hour waiting period requirement and found both to be unconstitutional. *Id.* at 777-780. While the 48-hour waiting period requirement was held severable, the two-parent notification requirement was held to be not severable and, accordingly, required that the entire notice-bypass procedure be enjoined in its entirety. *Id.* at 780-81. Both sides appeal.

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7 On March 2, 1982, the court issued a preliminary injunction against enforcement of subd. 2.

I.

The principles governing the constitutionality of the states' regulation of abortion have been set forth by the Supreme Court and bind this court. In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court held that the due process clause of the fourteenth amendment forbids the states from interfering with a pregnant woman's choice, with competent medical advice, to terminate her pregnancy. The right to choose abortion is, however, limited; state regulation is permissible to foster "compelling state interests" by "narrowly drawn" legislation. *Id.* at 155. Moreover, in view of the unique status of children under the law, states have a "significant" interest in supporting certain abortion regulations aimed at protecting children that is not present when the state seeks to regulate adults. *City of Akron v. Akron Center for Reproductive Health* (*Akron*), 462 U.S. 416, 427 n.10 (1983) (citing *Planned Parenthood v. Danforth*, 428 U.S. 52, 74-75 (1976)). Because of the "peculiar vulnerability of children; their inability to make mature decisions in an informed, mature manner; and the importance of the parental role in child rearing," the Court has recognized that states have a significant interest in promoting parental involvement with a minor who is seeking an abortion. *See H.L. v. Matheson*, 450 U.S. 398 (1981) (parental notice); *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 633-39, 648 (1979) (plurality opinion) (parental consent).

A majority of the Court, however, has indicated that these state and parental interests must give way to the constitutional right of a mature minor, or of an immature minor whose best interests are contrary to parental involvement, to obtain an abortion without consulting or notifying her parents. *Akron*, 462 U.S. at 427 n.10; *see e.g.*, *Matheson*, 450 U.S. at 414-420 (Powell, J., concurring); *id.* at 450-54 (Marshall, J., dissenting); *Bellotti II*, 443 U.S. at 643-44 (Powell, J.); *id.* at 653-56 (Stevens, J., concurring). In view of the unique nature and consequences of the abortion decision, states do not have the constitutional authority "to give a third party an absolute, and possibly arbitrary, veto" over the minor's abortion decision. *Bellotti II*, 443 U.S. 643 (Powell, J.); *id.* at 653-56 (Stevens, J.,

concurring); *Danforth*, 428 U.S. at 74-75. Thus, a state choosing to encourage parental involvement must provide an alternative procedure through which a minor may demonstrate that she is mature enough to make her own decision or that the abortion is in her best interest. *Akron*, 462 U.S. at 427 n.10; *see Bellotti II*, 443 U.S. at 643-44 (plurality); *Ind. Planned Parenthood v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983).

Justice Powell has described the nature and purpose of the required bypass proceeding:

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the "absolute, and possibly arbitrary, veto" that was found impermissible in *Danforth*.

Bellotti II, 443 U.S. at 643-44 (footnote and citation omitted). The judicial bypass procedure outlined by Justice Powell in *Bellotti II* was subsequently endorsed by a majority of the Court in *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 490-93 (1983), *id.* (upholding consent/bypass statute) and *Akron*, 462 U.S. at 438-40.

A.

Based on these principles, the district court held subd. 2, the notification provision without judicial bypass, unconstitutional. The court concluded that Minnesota may not require a minor to notify her parents of her intent to have an abortion without providing an alternative court procedure. *Hodgson*, 648 F. Supp. at 773.

Although *Bellotti II* considered the constitutionality of a parental consent rather than parental notice statute, the plurality opinion indicated that a state is required to make the alternative bypass procedure available under both types of statutes. *Id.* at 647. *See Akron*, 462 U.S. at 441 n.31; *Matheson*, 450 U.S. at 420 and n.9 (Powell, J., concurring) (stating that the rationale for requiring a state to provide a judicial bypass to a consent requirement is applicable to notification statues); *id.* at 428 n.3 (Marshall, J., dissenting); *see also Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985), *aff'd without op.*, 108 S. Ct. 479 (1987); *Pearson*, 716 F.2d at 1132. *Cf. Matheson*, 450 U.S. at 409 (Constitution is not violated by statute requiring notice to the parents of an immature dependent minor seeking an abortion).[8] The state argues in its brief that the notification requirement without the judicial bypass option is constitutional, but did not press this position at oral argument. We conclude that the district court did not err in ruling that a bypass procedure is constitutionally required by the several Supreme Court decisions cited above as an alternative to parental notification.

B.

The district court then examined the constitutionality of the notice/bypass provision. The court made a variety of factual findings with respect to the operation of the court bypass procedure over the past five years. It outlined in detail the availability of abortion services in Minnesota, underscoring the fact that virtually all of Minnesota's abortion providers are located in the two major metropolitan areas of the state: Duluth and

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8 The Court's primary holding in *Matheson* was that the pregnant minor challenging Utah's abortion notice requirement on the ground that it impermissibly applied to mature or emancipated minors lacked standing to raise that argument since she had not alleged that she or any member of her class was mature or emancipated. *Id.* at 406. The majority opinion did not decide whether a pure notice requirement would be constitutional as applied to emancipated or mature minors. Five justices, however, expressed the view that it would be unconstitutional to apply a notice requirement to minors who could demonstrate their maturity. *Id.* at 420 (Powell, J., concurring); *id.* at 428 n.3 (Marshall, J., dissenting).

Minneapolis-St. Paul. Many women had to travel long distances to obtain an abortion and the court recognized transportation problems facing women seeking an abortion, particularly during the winter. Women from outside the metropolitan areas tended to have abortions later in their pregnancy than women from other parts of the United States. *Hodgson*, 648 F. Supp. at 761.

The court also found that the experience of going to court for judicial authorization subjected the minors to a great deal of stress and that some considered the court proceedings more difficult than the abortion itself. The court found that the two-parent notice requirement affected many minors living in single-parent homes who had notified the custodial parent and minors living in two-parent homes who voluntarily consulted with one parent. These minors either had to notify the second parent or go through the court bypass procedure. The court found that either option was emotionally traumatic and interfered with the communication voluntarily initiated by the minor. The court noted that these instances were not uncommon and were supported by the fact that approximately 20-25% of minors who went to court were accompanied by, or indicated that they had consulted with, one parent. *Id.* at 763-64.

Many of the judges who heard bypass petitions testified that they felt the procedure was traumatic for the minors and did little good. Dr. Hodgson, one of the plaintiffs, testified that there was no benefit whatsoever to the law and that the law had created "nothing but problems" for her teenage patients. There was testimony that the law did not enhance parent-child communication or improve family relations. *Id.* at 766-68.

Against these considerations, the court assessed the strength of the state's interests and the extent to which the statute furthered these interests. The court found that the statutory goal is to foster intra-family communication and to protect the well-being of pregnant minors by encouraging them to discuss with their parents the decision whether to have an abortion. The statute was designed to enable parents to provide support and guidance and prevent their daughters from making irrational and emotional decisions. Parents might also be able to provide medical history of which the minor may be unaware, help with post-

abortion care, and support the child psychologically. The court found that the legislature also wanted to deter and dissuade minors from choosing abortion. *Id.* at 765-66.

The court found the two-parent notice requirement placed a substantial burden of obtaining a judicial waiver upon a group of minors composed almost entirely of either mature minors or minors whose best interests were not served by notification. It ultimately concluded that this burden was not justified by the state's interest in encouraging intra-family communication and protecting immature minors because the statute did not further either of these interests in any meaningful way.[9] The court rejected the possibility that the statute's existence encouraged immature, non-best interest pregnant minors to notify their parents and that this intangible effect was not amenable to proof at trial. *Id.* at 775-76.

Despite these factual findings, the district court concluded that *Bellotti II* required its holding that the notice/bypass procedure as a whole was constitutional. The court recognized that it was "not writing on a clean slate" in determining the constitutionality of Minnesota's parental notification statute and that the Supreme Court has limited its inquiry to an issue of statutory construction: specifically, whether Minnesota provides a judicial alternative to notification that is consistent with established legal standards. *Hodgson*, 648 F. Supp. at 776-77 (citing *Ashcroft*, 462 U.S. at 491-92). The court found that the "maturity" and "best interest" standards articulated in the Minnesota statute complied with those in *Bellotti II* and that the

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9 We note that according to the testimony of Paula Wendt, co-director of the Meadowbrook Clinic, parental notification under the statute has increased. Prior to the statute, Wendt testified that approximately 25% of the pregnant minors she counseled told one or both parents of their pregnancy and intended abortion. Since the law has been in effect Wendt testified that about 50% of the minor patients comply with the statute under the court bypass procedure. Since very few minors have been excused under the emancipation or abuse/neglect exceptions, it follows that there has been a marked increase in parental notification. Because the state did not offer any evidence concerning the effects of this notification, we observe only that since the statute has been in place, the percentage of parents notified of their daughters' intended abortion has increased.

Minnesota courts have applied these standards in hearing bypass petitions. *Id.* at 777.

The court then determined that the judicial bypass procedure, in actual operation, was being applied constitutionally. The court found that judges had almost never denied a minor's petition to proceed with the abortion without notifying her parents; there were only nine instances.[10] It found that the Minnesota courts have established procedures to assure the minor's anonymity and to expedite both the initial hearing and any subsequent appeal. The delays, although burdensome to minor petitioners, did not reflect a "systemic failure to provide a judicial bypass option in the most expeditious, practical manner." *Id.* The court concluded that the judicial bypass procedure, as presently executed by the Minnesota courts and other offices that participate in the bypass proceedings, complied with the legal standards set forth in *Bellotti II* and approved in *Ashcroft*. Therefore the court rejected the plaintiffs' challenge to Minnesota's notice/bypass requirement as a whole. *Id.*

The Hodgson group (the class-action minors, physicians, clinics and parent) argues that the district court erred in limiting its inquiry to an issue of pure statutory construction, because no court has considered the actual effect of a consent/bypass or notice/bypass statute in operation. They argue that the state failed to meet its burden of proving that the statute in actual operation serves significant state interests without unduly burdening minors' constitutional rights. They attack the assumptions implicit in *Bellotti II* and *Ashcroft* that a notice or consent requirement imposed in conjunction with an appropriate alternative bypass procedure serves significant state interests without unduly burdening the right of a mature or best interest minor to obtain an abortion. The state, on the other hand,

10 Bypass petitions had been filed in 3,573 cases and granted in 3,558 of them. Six petitions were withdrawn, nine petitions were denied and one had been appealed. Of the nine denied petitions, some were apparently justified (e.g., minor didn't really want an abortion/changed her mind), and one was reversed on appeal. The court found that the courts outside the metropolitan areas were more likely to deny the petitions, some being due to the court's unfamiliarity with the system and several involving rather unusual circumstances. *Id.* at 765.

urges that its authority to require parental notification with a court bypass has been established as a matter of law.[11]

We recognize that a statute may be facially valid, yet upon full development of a factual record be considered unconstitutional in operation.[12] We are satisfied, however, that the Supreme Court has considered the issues factually before the district court,[13] and that approval given to similar statutory plans mandates approval in this case. *See Ashcroft*, 462 U.S. at 490-93; *Matheson*, 450 U.S. at 409.

To be sure, the district court's detailed factual findings concerning the general difficulties of obtaining an abortion in Minnesota and the trauma of the bypass procedure, compared to its effectiveness, raise considerable questions about the practical wisdom of this statute. Nevertheless, we believe these are questions for the legislature. The minor's pregnancy itself is trau-

11 *See Akron*, 462 U.S. at 427 n.10; *Ashcroft*, 462 U.S. at 490-93; *Matheson*, 450 U.S. at 407-12, 419-25; *Bellotti II*, 443 U.S. at 633-40. *See also Zbaraz*, 763 F.2d at 1532; *Pearson*, 716 F.2d at 1133 (7th Cir. 1983).

12 *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *Storer v. Brown*, 415 U.S. 724 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Elbe v. Yankton Indep. School Dist.*, 714 F.2d 848 (8th Cir. 1983).

13 As stated by Justice Stevens:

> If there is no parental-[notice] requirement many minors will submit to the abortion procedure without ever informing their parents. An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children to bypass parental counsel which would in fact be loving, supportive, and, indeed, for some indispensable. It is unrealistic, in my judgment to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will . . . [act] arbitrarily to further a selfish interest rather than the child's interest. A state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-[notice] requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make and implement a correct decision.

Danforth, 428 U.S. at 103-104 (Stevens, J., concurring in part and dissenting in part); *see also Matheson*, 450 U.S. at 419-20 (Powell, J., concurring); *id.* at 424 (Stevens, J., concurring).

matic and if she considers abortion, complex issues arise involving numerous competing interests. These interests have been fully recognized by the Supreme Court. A minor's decision to obtain an abortion may not be unconstitutionally burdened, *Matheson*, 450 U.S. at 418-19 (citations omitted), but "the peculiar vulnerability of children; their inability to make mature decisions in an informed, mature manner; and the importance of the parental role in child-rearing," *Bellotti II*, 443 U.S. at 634 (plurality), provides the states with a strong interest in promoting parental involvement. *Akron*, 462 U.S. at 427 n.10. The Supreme Court has considered these competing interests and recognized as a matter of law that parental notice or consent requirements do not unconstitutionally burden a minor's abortion right when an appropriate judicial bypass is in place. *See Ashcroft*, 462 U.S. at 490-94 (challenge to the constitutionality of Missouri's consent/bypass statute treated purely as an issue of statutory construction). *See also Akron*, 462 U.S. at 438-40 (same); *Zbaraz*, 763 F.2d at 1539-45 (same); *Pearson*, 716 F.2d at 1133 (same). We therefore reject the Hodgson group's arguments to the contrary.

Careful study of *Bellotti II*, *Ashcroft*, and *Matheson* reveal the significant state interests which justify Minnesota's notice/bypass statute. Notwithstanding the district court's factual findings, it recognized that the Supreme Court has assumed and recognized certain interests as a matter of law. In *Bellotti II*, a plurality of the Court identified the significant state and parental interests at stake when a minor faces the decision of whether to have an abortion. The special importance and consequences of the abortion decision for the minor are recognized as a sufficient justification for reasonable state efforts to ensure that the decision be wisely made:

> "[Plaintiffs] suggest . . . that the mere requirement of parental notice [unduly burdens the right to seek an abortion]. * * * [H]owever, parental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-

> range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns . . . .
>
> "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.' "

Bellotti II, 443 U.S. 640-641 (plurality) (footnotes omitted) (quoting *Danforth*, 428 U.S. at 91 (concurring opinion)). *See also Bellotti II*, 443 U.S. at 657 (dissenting opinion); *Matheson*, 450 U.S. at 409-10; *id.*, at 422-23 (concurring opinion).

In addition, the state has an interest in the family itself, the institution in which "we inculcate and pass down many of our most cherished values, moral and cultural." *Matheson*, 450 U.S. at 419 (concurring opinion) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503-04 (1977)). Parents have a traditional and substantial interest in, as well as a responsibility for, the rearing and welfare of their children. In *Matheson*, the Court stated:

> [C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society:
>
> We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include prepara-

> tion for obligations the state can neither supply nor hinder"
>
> We have recognized that parents have an important "guiding role" to play in the upbringing of their children, which presumptively includes counseling them on important decisions.

450 U.S. at 410 (citations omitted).[14]

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14 The "guiding role" parents have in bringing up their children is explained by Justice Powell:

> [T]he guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors. The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors. But an additional and more important justification for state deference to parental control over children is that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." "The duty to prepare the child for 'additional obligations' . . . must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." This affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens.
>
> We have believed in this country that this process, in large part, is beyond the competence of impersonal political institutions. Indeed, affirmative sponsorship of particular, ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice. Thus, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include *preparation for obligations the state can neither supply nor hinder*."
>
> Unquestionably, there are many competing theories about the most effective way for parents to fulfill their central role in assisting their children on the way to responsible adulthood. While we do not pretend any special wisdom on this subject, we cannot ignore that central to many of these theories, and deeply rooted in our nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children. Indeed, "constitutional interpretation has consistently recognized that the parents' claim to authority

Finally, the Supreme Court has recognized the significant state interest in providing an opportunity for parents to supply essential medical and other information to a physician:

> The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history such as family physicians, and authorize family physicians to give relevant data.

Matheson, 450 U.S. at 411.

Because of these interests, a plurality of the Court in *Bellotti II* concluded that a parental consent statute, when an alternative bypass mechanism is in place, does not unconstitutionally burden a minor's abortion right. *Bellotti II*, 443 U.S. at 649. *See also Ashcroft*, 462 U.S. at 490-93. and *Matheson*, 450 U.S. at 411-14; *id.* at 418-20, 423-25 (Powell, J. concurring) (dealing with a notice requirement). Certainly, the evidence demonstrates that these interests and principles apply differently in individual child-parent relationships. The child living in a no-parent or one-parent household may face different considerations than a child living in a two-parent home, as do the mature minor and the immature minor. But to allow specific

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> in their own household to direct the rearing of their children is basic in the structure of our society."
>
> Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding. Under the Constitution, the State can "properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."

Bellotti II, 443 U.S. at 637-639 (plurality) (citations and footnotes omitted) (emphasis added).

factual findings with reference to the mature minor or the minor from no- and one-parent households to invalidate the notice/bypass procedure would defeat the recognized parental interests, particularly with respect to the immature and vulnerable child. *See Matheson*, 450 U.S. at 420 (Powell, J., concurring) ("The circumstances relevant to the abortion decision by a minor can and do vary so substantially that absolute rules—requiring parental notice in all cases or in none—would create an inflexibility that often would allow for no consideration of the rights and interests [we have] identified"). If there is to be any regulation, and the Supreme Court has clearly upheld regulation with respect to two-parent families and immature minors, it must apply to all. The Minnesota statute does not require parental notice in all cases. *Cf. Danforth*, 428 U.S. at 74-75. The statute provides exceptions for emancipated minors, minors who are the victims of abuse, and for abortions necessary in an emergency. Most importantly, the statute provides for judicial bypass of the notification requirement for all minors if the minor is mature enough to make the abortion decision independently or if notification would not be in her best interests.[15] *See Bellotti II*, 443 U.S. at 643-44 (plurality); *Ashcroft*, 462 U.S. at 490-93. The bypass procedure provides an effective and independent method for analyzing the situation of the individual pregnant minor—her maturity or immaturity; her no-parent, two-parent or one-parent background; and for determining if it is in her best interests that both parents not be notified. We conclude that the statute complies with the standards set forth in *Bellotti II* and that the Supreme Court's approval of similar plans mandates approval here. *Ashcroft*, 462 U.S. at 490-93; *Matheson*, 450 U.S. at 413. The district

15 In *Bellotti II*, Justice Stevens joined by three other justices concluded that the Massachusetts statute before the Court was unconstitutional because under the statute, as written and construed by the Massachusetts Supreme Court, no minor, no matter how mature and capable of informed decision-making, could receive an abortion without the consent of either both parents or a superior court judge, thus making the minor's abortion decision subject in every instance to an absolute third-party veto. *Id.* at 652-56. In comparison, the statute here gives neither a judge nor parents veto power over the minor's abortion decision.

court did not err in concluding that the statute, as a whole, is constitutional.

C.

After confirming the constitutionality of the statute as a whole, the court considered in isolation Minnesota's two-parent notice requirement. The court discussed the high incidence of divorce and the effect this often has on family communication. According to the court, approximately 50% of all marriages in Minnesota end in divorce, and approximately 42% of all minors in Minnesota do not live with both biological parents. Further, the court found that many minors in Minnesota "live in fear of violence by family members," and that the incidence of family violence is dramatically underreported. The court found that parental notification can only add to the magnitude of the problem of family violence which, in turn, intensifies the distress and anxiety of the minor's abortion decision. The court noted that divorce and separation usually impair family communication, with the non-custodial parent often having little communication with the child. The court also stated that the effect of compelling a minor in this situation to share information about her pregnancy and abortion decision with both parents can be harmful, particularly when the minor comes from an abusive, dysfunctional family. The court found that 20-25% of minors who went to court notified one parent voluntarily and that minors who ordinarily would notify one parent might be dissuaded from doing so by the two-parent requirement. *Hodgson*, 648 F. Supp. 768-69.

Based on these findings, the court concluded that "the need to notify the second parent or to make a burdensome court appearance actively interferes with the parent-child communication voluntarily initiated by the child, communication assertedly at the heart of the state's purpose in requiring notification of both parents. In these cases, requiring notification of both parents affirmatively discourages parent-child communication." *Id.* at 777-78. Thus, the court concluded that the two-parent notice requirement failed to further the state's interests in protecting pregnant minors and promoting family communi-

cation and was therefore invalid. *Id.* at 778 (citing *Carey v. Population Services Int'l*, 431 U.S. 678, 693 (1977); *Danforth*, 428 U.S. at 75). The court rejected the argument that the two-parent notice requirement could be severed. *Hodgson*, 648 F. Supp. at 780.

The Hodgson group argues that the district court's findings of fact are not clearly erroneous and that under *Andersen v. Bessemer City*, 470 U.S. 564 (1985), affirmance of the district court is mandated. The state in response does not attack the findings of the district court, but argues with some force that once the district court determined that the procedure as a whole was constitutional as a matter of statutory interpretation, its inquiry should have ended. We confess some confusion as to why the district court examined the two-parent notice and the 48-hour delay requirements in isolation and applied its conclusions to invalidate the entire statutory procedure it had just approved. Possibly it felt required to do so by the limitation of the holdings in *Belotti II*, 443 U.S. at 649 (plurality) (minors living at home with both parents), and *Matheson*, 450 U.S. at 411 (immature and dependent minors). Certainly, the Supreme Court limited its holdings to such minors. Nevertheless, the limitations of the holdings do not prevent the application of the principles announced by the Supreme Court to both the no-parent and one-parent households as well as the mature minor. We are satisfied that the issue here then is not the district court's factual findings, but its failure to take full account of these recognized principles.

In particular, as applied to all pregnant minors, regardless of their family circumstances, the district court did not consider whether parental and family interests (as distinguished from the interests of the minor alone) justified the two-parent notice requirement. As discussed in Part B, *supra*, the Supreme Court has recognized the significant interests of parents in the rearing and welfare of their children and that these interests justify parental involvement in the minor's abortion decision. The Supreme Court has never indicated that these interests are contingent upon the parent having custody of the child.

The district court's conclusion that the two-parent notice requirement failed to further the state's interests was based primarily on its factual findings regarding the burden imposed on minors in family units that have either "broken apart or never formed."[16] *Hodgson*, 648 F. Supp. at 778. The statutory plan before us demonstrates the difficulty of designing an overall plan which must apply to all pregnant minors regardless of their family circumstances. Certainly, the application of such a general statute will result in greater burdens for some individuals. Indeed, this is the very reason the Supreme Court has concluded that a judicial bypass is imperative; the alternative bypass procedure would be unnecessary unless some burden resulted from the generality of the statute. Any added burden the two-parent notification requirement imposes in individual cases is negated by the judicial bypass mechanism, which enables a mature or "best interests" minor to go directly to court without consulting or notifying both parents. *See Bellotti II*, 443 U.S. at 649 (plurality); *Matheson*, 450 U.S. at 420 (Powell, J., concurring). Similarly, the statute may not be invalidated because it does not correspond perfectly in all cases to the state's asserted interests. *See Akron*, 462 U.S. at 438.

In *Belotti II*, a plurality of the Court indicated that the requirement of obtaining both parents' consent, when an alternative judicial bypass is in place, does not unconstitutionally burden a minor's abortion right:

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16 This conclusion is based on somewhat limited factual findings concerning primarily the statute's burden on the minor living in a one-parent household who notified only her custodial parent. The district court also made a finding concerning the minor living in a two-parent home who may have consulted with one parent but, because of fear, not the other. *Hodgson*, 648 F. Supp. at 764 (finding 49). The court concluded only that instances in which the two-parent notice requirement burdened parent-child communications voluntarily initiated by the minor were "not uncommon." *Id.* (finding 50). This finding was later characterized as a significant obstacle. *Id.* at 778. A careful reading of the groups of related findings clearly indicates, however, that the court was primarily considering the impact of the statute on the minor living in a one-parent household who must notify the non-custodial parent. *Id.* at 764, 768-69 (findings 45-50; 68-72). The court's further discussion underscores this conclusion. *Id.* at 778.

We are not persuaded that, as a general rule, the requirement of obtaining both parents' consent unconstitutionally burdens a minor's right to seek an abortion. The abortion decision has implications far broader than those associated with most other kinds of medical treatment. At least when the parents are together and the pregnant minor is living at home, both the father and mother have an interest—one normally supportive—in helping to determine the course that is in the best interests of a daughter. Consent and involvement by parents in important decisions by minors long have been recognized as protective of their immaturity. In the case of the abortion decision, for reasons we have stated, the focus of the parents' inquiry should be the best interests of their daughter. As every pregnant minor is entitled in the first instance to go directly to the court for a judicial determination without prior parental notice, consultation, or consent, the general rule with respect to parental consent does not unduly burden the constitutional right. Moreover, where the pregnant minor goes to her parents and consent is denied, she still must have recourse to a prompt judicial determination of her maturity or best interests.

443 U.S. at 649.

Moreover, unlike the statute in *Bellotti II* which required the *consent* of both parents, the Minnesota statute requires only notification. Although we recognize that a notice requirement without judicial bypass would be unduly burdensome, at least as applied to mature minors, *cf. Matheson*, 450 U.S. at 409 (two parent notice requirement constitutional as applied to immature, dependent minors), we are satisfied that a notification requirement is substantially less burdensome than a consent requirement. Consent requires not only notification but also the affirmative agreement of one or both parents to the abortion. This can be expected to cause considerably more conflict, delay and ill effects than notification alone.

Although some parents may be abusive, or at best unhelpful to their minor child faced with the decision whether to have an abortion, that is hardly a reason to discard the pages of experience teaching that parents generally do act in their child's best interests.[17] *Parham v. JR*, 442 U.S. 584, 602-03 (1979). While the district court found that the non-custodial parent often has little communication with the child, this does not mandate completely casting aside the principles enunciated by the Supreme Court as to the parental role, which apply to non-custodial parents as well as custodial parents. By providing for judicial bypass, the statute safeguards those minors for whom parental involvement may not be in their best interests, while at the same time encouraging parental involvement for those minors who may be greatly assisted at a difficult time. We cannot conclude the two-parent notice requirement imposed in conjunction with a bypass option unduly burdens the right of a mature or best interests minor to obtain an abortion. *See Bellotti II*, 443 U.S. at 649 (plurality); *Matheson*, 450 U.S. at 420 (Powell, J., concurring).

The district court enjoined the entire statute because of the impact of the two-parent notice requirement primarily upon one group of pregnant minors, without considering the effect of the bypass, or the parental and family interests which have been recognized by the Supreme Court. In concentrating upon the impact of the statute on the pregnant minor not living with both parents, and on the mature or non best-interest pregnant minor, the district court gave only limited consideration to the 50% or more pregnant minors who live with both parents and to pregnant minors who are immature and whose best interests may require parental involvement. The district court's determination that an undue burden on the one group renders the statute unconstitutional for all is contrary to the Supreme Court's decision that a notice-consent/bypass procedure plainly serves important state interests and is narrowly drawn to protect only those interests. It does not violate any guarantees of the Constitution. *Matheson*, 450 U.S. at 413. We are convinced that the

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17 The Court has recognized two categories of pregnant minors. First, minors who are mature and capable of making an informed decision without parental involvement, the category in which the minor appellees in this case by their pleadings bring themselves, and second, minors who are immature not sufficiently capable of making such decisions; in both categories the best interest of the minor must be considered.

statute must be considered, as the Supreme Court has considered the statutes in its numerous decisions and as the district court originally did, as a whole: the two-parent notification, the 48-hour waiting period, and judicial bypass. Considering the statute as a whole and as applied to all pregnant minors, the two-parent notice requirement does not unconstitutionally burden the minor's abortion right. *Matheson*, 450 U.S. at 413. The statute complies with the constitutional requirements set forth in *Bellotti II*, and approved in *Ashcroft* and *Matheson*. We conclude that the court erred in enjoining the statute because of its isolated consideration of the two-parent notice requirement.

D.

Similar considerations apply to the district court's treatment of the 48-hour delay requirement. The court found that minors who notified their parents in writing must wait 48 hours after actual or constructive delivery of the notice. Constructive delivery of mail notice occurs at noon on the next day upon which regular mail delivery takes place. Thus, minors who notified their parents in writing commonly waited 72 hours between initiating the notification process and the abortion itself. The court found that this delay was compounded by the weather, scheduling factors, and transportation requirements and that in many cases the delay reached a week or more. Delay of any length in performing an abortion increased the statistical risk of mortality. *Hodgson*, 648 F. Supp. at 764-65.

In considering the plan as a whole, the court acknowledged that some period of delay from the time of notice until the abortion would "reasonably effectuate the state's interests in protecting pregnant minors" and that a "waiting period may allow parents to aid, counsel, and advise * * * minors in determining whether to undergo an abortion or to provide the physician with information which may be relevant to the medical judgments involved." The court concluded, however, that the interest could be effectuated as completely by a shorter waiting period. *Id.* at 769. The court held that the 48-hour waiting

period was severable from the remainder of the statute. *Id.* at 780.

Considering the statute as a whole, the 48-hour delay requirement is not a significant burden upon the minor's abortion right. The district court's finding regarding possible delays of a week or more is based upon facts relating to the relative inaccessibility of abortion providers in Minnesota, not the 48-hour delay requirement. The court failed to recognize that the 48-hour delay requirement may run concurrently with the scheduling of the appointment to perform the abortion. Testimony at trial revealed that typically, when a pregnant minor telephones an abortion clinic to schedule an abortion, the abortion is not scheduled for two to three days.[18] More importantly, mandatory delay results only when the minor complies with the statute by providing written notice to her parents; the bypass option imposes no mandatory delay. *Cf. Ashcroft*, 483 F. Supp. 679, 694-96 (W.D. Mo. 1980) (physician must provide woman information specified in statute 48 hours before she may consent to the abortion). We cannot conclude that the delay requirement as a part of the overall statutory scheme is a significant burden in light of Minnesota's interest in ensuring that notification results in parental involvement.[19] *See Matheson*, 450 U.S. at 446 (Marshall, J., dissenting).

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18 The district court found that the 48-hour delay requirement required a minor, living in a city without an abortion provider, to either travel to a city with an abortion provider twice or spend up to three additional days in the city. The parties do not specify and we are unsure of the evidence in the record to support this statement. According to the manual of Meadowbrook Women's Clinic, when a minor calls seeking information about an abortion she is asked her age and advised of the parental notice law. An abortion may be scheduled over the telephone and at that time, minors are asked how they plan to comply with the statute. If the minor wishes to comply by written notice, the clinic may send the appropriate notice immediately.

19 *Akron*, 462 U.S. at 449-51 (twenty-four-hour waiting period unconstitutional as applied to all women seeking abortions; *See also Zbaraz*, 763 F.2d at 1537-38 (twenty-four hour waiting period held unconstitutional); *Pearson*, 716 F.2d 1142-43 (same).

II.

The Hodgson group contends that the district court erred in holding that the statute does not violate the equal protection clause. First, they argue that the statute deprives minors who choose abortion of equal protection of the law because it singles out abortion as the only pregnancy-related medical procedure requiring third-party notification and because the statute impermissibly discriminates between those minors who are able to notify both their parents and those who cannot. The Hodgson group failed to raise the latter challenge at trial, and therefore we need not address it here. *Stafford v. Ford Motor Co.*, 790 F.2d 702, 706 (8th Cir. 1986). As to the first issue, a similar challenge was rejected by the Court in *Matheson*, 450 U.S. at 412-13, and the Court has rejected challenges to abortion statutes based on different treatment in other contexts. *Harris v. McRae*, 448 U.S. 297, 325 (1980) (abortion funding); *Maher v. Roe*, 432 U.S. 464, 469-71 (1977) (abortion funding); *Danforth*, 428 U.S. at 66-67 (written consent to abortion). Moreover, as discussed in Part I, *supra*, a state may regulate a minor's exercise of her constitutional rights in a manner that would not be permissible in the case of an adult. *Akron*, 462 U.S. at 427 n.10. Based on the interests discussed, states may rationally conclude that the decision to have an abortion poses risks to the physical, mental or emotional well-being of minors which are greater than those associated with other health care services. *Bellotti II*, 443 U.S. at 640-41, 648-49 (plurality). "If the pregnant girl elects to carry her child to term, the *medical* decisions to be made entail few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort." *Matheson*, 450 U.S. at 412-13. Thus, we cannot say the district court erred in concluding the statute does not violate the equal protection clause.

We conclude that the Minnesota statutory plan, including judicial bypass, is constitutional and complies with the principles announced in *Bellotti II*, *Ashcroft* and *Matheson*. Accordingly, we reverse the judgment of the district court and remand with instructions that the district court enter judgment that Minn. Stat. Ann. § 144.343 (2)-(7) is constitutional.

LAY, Chief Judge, with whom MCMILLIAN, Circuit Judge, joins, dissenting.

I respectfully dissent.[1] I would adhere to the well-reasoned panel opinion written by Judge Rosenn.*

The majority's analysis is seriously flawed in several respects:

(1) it fails to focus on the issue involved, which is whether a two-parent notification statute with a judicial bypass provision is constitutional;

(2) it completely ignores the evidence amassed in a five-week trial and the district court's findings of fact as irrelevant to the constitutional issue;

(3) without legal support, it relies upon the judicial bypass provision to uphold an unconstitutional two-parent notification requirement;

(4) it has created a new right, apparently of constitutional dimension, for non-custodial parents to receive notice of their minor children's activities; and

(5) its upholding of the 48-hour waiting period is contrary to nearly every other court decision on this issue.

It is important to recognize the limited issue before this court: may a state constitutionally enact a statute that requires a minor to notify both parents before she may obtain an abortion, even though one parent may have deserted her or has no custodial rights over her. The majority spends most of its discussion reciting the reasoning of cases in which the Supreme Court examined the facial constitutionality of various parental consent or

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1 I concur in section IA. of the majority's opinion, which holds that Minn. Stat. § 144.343(2) is unconstitutional because Minnesota may not require a minor to notify her parents of her intent to have an abortion without providing an alternative court procedure. *See Bellotti v. Baird*, 443 U.S. 622, 647 (1979) (*Bellotti II*).

* The Honorable Max Rosenn, Senior United States Circuit Judge for the Third Circuit Court of Appeals, sitting by designation.

notification statutes.[2] Its discussion, however, avoids the fundamental issue of this case, which is the effects of the application in Minnesota of the two-parent notice rule. Minnesota is the only state in the union that requires two-parent notification without exception for divorce, separation, or other comparable situations. A statute of this type has never been reviewed by the Supreme Court.

Our duty therefore should be to examine the two-parent notification requirement to determine whether the statute "plainly serves important state interests [and] is narrowly drawn to protect only those interests * * * ." *H.L. v. Matheson*, 450 U.S. 398, 413 (1981). The state bears the burden to show that the statute is tailored to achieve a significant state policy. The district court found as a matter of fact that the statute not only fails to *serve* the state's asserted interests, but that it actually *undermines* those interests. *Hodgson v. Minnesota*, 648 F. Supp. 756, 768 (D. Minn. 1986).

The majority simply ignores the district court's factual findings. I respectfully submit that in doing so it abdicates its judicial responsibility. Judge Gibson, writing for the majority, states: "[T]he district court's detailed factual findings * * * raise considerable questions about the practical wisdom of this statute. Nevertheless, we believe these are questions for the legislature." Slip op. at 14. Thus, and because it never directly states that the district court's factual findings are clearly erroneous, the majority rejects the established principle that states must *demonstrate* that their infringements of constitutional rights are closely related to achieving important interests. Nowhere does the majority point to evidence offered by the state to show the relationship between the ends sought and the means utilized. Instead, the majority apparently relies on two

2 On cross-appeal plaintiffs urge that as applied the notice/bypass statute as a whole imposes an unconstitutional burden on minors seeking abortions. They challenge the relevance of the Supreme Court's holdings in *H.L. v. Matheson*, 450 U.S. 398 (1981), and *Bellotti II*, which involved facial attacks on parental consent or notification statutes. But in the interest of judicial restraint the dissent does not need to discuss this issue. It is far better that the Supreme Court make that determination in light of the record. We need to focus only on the two-parent notice Minnesota statute before us.

factors to support its cavalier treatment of the district court's factual findings.

The first factor relied upon is "the pages of experience teaching that parents generally do act in their child's best interests." Slip op. at 24. The second basis for the majority's action is its misplaced theory that the Supreme Court has decided as a matter of law "that a notice-consent/bypass procedure plainly serves important state interests and is narrowly drawn to protect only those interests." Slip op. at 25. Neither of these assertions can justify the result today.

Our societal presumption that parents generally act in their children's best interests is not at issue here. The relevant question is whether requiring two-parent notification without exception for cases of divorce, separation, desertion, or other comparable familial situations imposes undue burdens on the minor's exercise of her constitutional rights. Plaintiffs introduced largely unrebutted factual evidence that persuaded the district court that the requirement is unduly burdensome. We cannot ignore this evidence based on an irrelevant societal presumption. *Cf.* Bikle, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 Harv.L.Rev. 6, 6 (1924):

> [N]o court can undertake to decide upon the validity of legislation * * * [without] first be[ing] informed as to the truth of some question of fact which the statute postulates or with reference to which it is to be applied; and the validity of the legislation depends on the conclusions reached by the court with reference to this question of fact.

Similarly, the majority's theory that the Supreme Court has held that all notice/bypass procedures are constitutional as a matter of law is insupportable. The Court has never examined the validity of a statute like Minnesota's; the statute is unparalleled in this country. Furthermore, the Court has never examined a notification requirement in operation, because all of the cases in which it examined such statutes involved facial challenges. It is impossible for the Court to have declared as a matter of law that all notice/bypass procedures are "narrowly

drawn to protect only [important state] interests" when the statutory provisions can contain as many variations as there are statutes.

The majority reasons that although the two-parent notification requirement imposes a burden on the minor, this burden is negated by the judicial bypass provision. This analysis is egregiously wrong. The mere presence of an alternative bypass procedure cannot salvage the two-parent notification requirement.

The majority's analysis fails to recognize that a judicial bypass procedure has been required not for the purpose of making an unconstitutional notice provision constitutional, but because even a valid notice requirement may be imposed only on minors who are immature or whose best interests would not be served by making the abortion decision without parental involvement. *See City of Akron v. Akron Center for Reproductive Health, Inc.* 462 U.S. 416, 427-28 n.10 (1983); *Bellotti v. Baird*, 443 U.S. 622, 647-48 (1979) (plurality) (*Bellotti II*). There is an entire class—immature, non-best interests minors—that can never use the judicial bypass procedure. The court therefore must examine the notification requirement in isolation because as to these minors there is absolutely no alternative to parental notification, even with the statutory provision of a bypass procedure.

The second reason the bypass provision does not purge the statute of its unconstitutionality has to do with the combined effect of requiring either two-parent notification or submission to a judicial procedure. As the district court found:

> Twenty to twenty-five percent of the minors who go to court either are accompanied by one parent who knows and consents to the abortion or have already told one parent of their intent to terminate their pregnancy. The vast majority of these voluntarily informed parents are women who are divorced or separated from spouses whom they have not seen in years. Going to court to avoid notifying the other parent burdens the privacy of both the minor and the accompanying parent. The custodial parents are angry that their consent is not sufficient and fear that notification will bring the absent parent back into the family in an intrusive and abusive way.
>
> Minors who ordinarily would notify one parent may be dissuaded from doing so by the two-parent requirement. A minor who must go to court for authorization in any event may elect not to tell either parent. In these instances, the requirement that minors notify both biological parents actually reduces parent-child communication.

648 F. Supp. at 769. Thus, a two-parent notification requirement, combined with the alternative bypass provision, actually *reduces* parent-child communications. The combination also completely negates the interest of certain minors—those twenty to twenty-five percent who go to court accompanied by a parent—in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599 (1977) (right of privacy protects interest in avoiding disclosure of personal matters as well as interest in independent decisionmaking). These minors voluntarily inform one parent of their intent to obtain an abortion; the district court found that these parents generally are divorced or separated. Yet these minors must still go through the burdensome court procedure and the public disclosure of intensely personal facts that the procedure entails.[3] Coercing public

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3 The district court found:

> The experience of going to court for a judicial authorization produces fear and tension in many minors. Minors are apprehensive about the prospect of facing an authority figure who holds in his hands the power to veto their decision to proceed without notifying one or both parents. Many minors are angry and resentful at being required to justify their decision before complete strangers. Despite the confidentiality of the proceeding, many minors resent having to reveal intimate details of their personal and family lives to these strangers. Finally, minors are left feeling guilty and ashamed about their lifestyle and their decision to terminate their pregnancy. Some mature minors and some minors in whose best interests it is to proceed without notifying their parents are so daunted by the judicial proceeding that they forego the bypass option and either notify their parents or carry to term.
>
> Some minors are so upset by the bypass proceeding that they consider it more difficult than the medical procedure itself. Indeed, the anxiety resulting from the bypass proceeding may linger until the time of the medical procedure and thus render the latter more difficult than necessary.

648 F. Supp. at 763.

disclosure when one divorced or separated parent has already been informed of the minor's decision cannot serve any significant state interest; if it does, the state did not offer any persuasive proof of that fact.

Finally, if courts do not separately examine the notification portions of these statutes, states could formulate irrational and burdensome requirements, all in the guise of protecting "family integrity." Suppose, for instance, that in addition to requiring parental notification, a state required notice to all living grandparents. Based on the majority's reasoning, this requirement, although perhaps burdensome to some minors, would be constitutional as long as combined with an alternative expeditious and confidential bypass procedure. Yet at some point a state's notification requirements could become so burdensome as to force *all* minors to go to court. As the state conceded at oral argument, however, a bypass provision could not pass constitutional scrutiny by itself. Moreover, the majority acknowledges that "[t]he circumstances relevant to the abortion decision by a minor can and do vary so substantially that absolute rules * * * would create an inflexibility that often would allow for no consideration of the rights and interests [we have] identified." *Matheson*, 450 U.S. at 420 (Powell, J., concurring), *quoted in* slip op. at 19. To avoid these types of absolute rules, states must provide alternatives for the minor, none of which can be so burdensome as to amount to a denial of constitutional rights. If one "alternative" is unconstitutional, minors effectively are governed by absolute rules. Courts therefore must examine *each* of the alternatives the states devise. The majority's failure to recognize or accept this principle is inexplicable.

An equally inexplicable thread running through the court's opinion is its solicitious concern for the rights of non-custodial parents.[4] The court's emphasis on the interest of non-custodial parents in being informed of their minor children's activities elevates that interest so as to outweigh the recognized constitutional rights of minors. It does so based on a misunderstanding of the reasons the Supreme Court has approved of parental notification laws and of the nature of child custody laws.

4 *See, e.g.*, slip op. at 22 ("The Supreme Court has never indicated that [the interests of parents in the rearing and welfare of their children] are contingent upon the parent having custody of the child."); *id.* at 24 ("[T]he principles enunciated by the Supreme Court as to the parental role [apply] to non-custodial parents as well as custodial parents.").

The Supreme Court has never declared that parents (much less non-custodial parents) have an absolute, independent right to be informed when their minor children seek to have an abortion. Rather, the Court has approved of such requirements primarily as a means of furthering the state's interest *in protecting the minor* by assuring that she makes a well-informed decision. *See, e.g., City of Akron*, 462 U.S. at 439 ("In [*Bellotti II*,] a majority of the Court indicated that a State's interest *in protecting immature minors* will sustain a requirement of a consent substitute, either parental or judicial.") (emphasis added); *Matheson*, 450 U.S. at 412 ("The [parental notification] statute is reasonably calculated *to protect minors* * * * by enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences.") (emphasis added); *id.* at 419 ("The State * * * has an interest in fostering such consultation as will assist the minor in making her decision as wisely as possible.") (Powell, J., concurring); *Bellotti II*, 443 U.S. at 638 ("Legal restrictions on minors, especially those supportive of the parental role, may be important *to the child's chances* for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.") (plurality) (emphasis added; footnote omitted).[5]

There is more than a little irony in the majority's assumption that the state promotes "family integrity" by forcing minor

5 In equating the rights of non-custodial parents with those of custodial parents, the majority ignores basic principles of child custody law. The fact is that the legal rights of non-custodial parents are indeed inferior to those of custodial parents:

> [T]he parent with "legal custody" has the right to make decisions about the child's education, religious training, residence, and medical treatment. Generally, this parent also has "physical" or "actual" custody which entitles her to control the child's daily activities such as sleeping, eating, and recreation. The rights and obligations of the non-custodial parent are a good deal more limited. Typically, *that parent loses all power with respect to major decisions.*

Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 Yale L.J. 757, 808 (1985) (emphasis added; footnote omitted).

children to locate and inform non-custodial parents of this decision. Approximately 42% of all minors in Minnesota do not live with both biological parents. *Hodgson*, 648 F. Supp. at 768. For all of these minors, the "family" does not consist of the traditionally accepted unit, because of voluntary relinquishment of parental control, legal separation of parent and child, or other reasons. Yet the state of Minnesota declares that in this one instance only (a suspect indication in itself) the "family" must conform to state-mandated principles of what a family should be like.[6] Far from promoting the integrity and independence of the family unit, the state is interfering in familial communications in a way that would be unimaginable in any other context. To justify this interference based on the purported rights of non-custodial parents is specious.

I turn now to the majority's upholding of the 48-hour delay rule. The majority's conclusion that the delay requirement is constitutional is based not upon logical analysis, but rather upon three assertions:

> (1) prolonged delay due to the inaccessibility of abortions in Minnesota is irrelevant;
>
> (2) the 48-hour delay requirement may run concurrently with the scheduling of the appointment to perform an abortion; and
>
> (3) the delay results only when the minor actually complies with the notification requirement rather than using the bypass procedure.

Slip op. at 27.

The first assertion ignores the reasoning of many courts that have considered other factors peculiar to the region in assessing

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6 The Supreme Court itself has recognized that concerns for the integrity of the family may be far different when that family no longer conforms to the customary structure. *See Bellotti II*, 443 U.S. at 649 ("*At least when the parents are together and the pregnant minor is living at home*, both the father and the mother have an interest—one normally supportive—in helping to determine the course that is in the best interests of a daughter.") (plurality) (emphasis added).

the constitutionality of waiting periods.[7] The second assertion ignores the possibility that abortion providers could schedule abortions for minors far more quickly absent the delay require-

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7 The Seventh Circuit recently summarized this reasoning:

> These cases hold that a waiting period places a direct and substantial burden on women who seek to obtain an abortion. This burden is the same for minors as for adults, *Bellotti II*, 443 U.S. at 642, 99 S.Ct. at 3047; *Charles v. Carey*, 627 F.2d [772, 785 (7th Cir. 1980)], and therefore "the same objections to the waiting periods for adults listed in *City of Akron* apply to waiting periods for minors." [*Indiana Planned Parenthood v.*]*Pearson*, 716 F.2d [1127, 1143 (7th Cir. 1983)]. The burden imposed by a waiting period has been reiterated with little variation in these cases. The District Court of Rhode Island cogently discussed several factors which it considered part of this burden in *Women's Medical Center of Providence, Inc. v. Roberts*, [530 F. Supp. 1136 (D.R.I. 1982)], stating
>
> > Although a mere twenty-four hour delay by itself may not increase the risk of an abortion to a statistically significant degree, the record in this litigation shows that the mandatory wait may combine with other scheduling factors such as doctor availability, work commitments, or sick leave availability, to increase the actual waiting period to a week or more . . . . [I]t is uncontested that delays of a week or more do indeed increase the risk of abortion to a statistically significant degree . . . . Furthermore, a delay of even twenty-four hours may push a woman into the second trimester, thus requiring that the operation be performed in a hospital, and significantly increasing the procedure's cost, inconvenience, and, of course, risk.
>
> 530 F. Supp. at 1146.
>
> Courts have also noted that difficulties in scheduling may be complicated by the distance which a woman may have to travel in order to obtain an abortion. An extreme example of this was before the District Court of North Dakota in *Leigh v. Olson*, [497 F. Supp. 1340 (D.N.D. 1980)], in which the district court found that only one doctor in the entire state performed abortions and that women in certain parts of the state would have to drive some 400 miles in order to obtain an abortion. 497 F. Supp. at 1347. Finally, the cases cited above have noted that a waiting period may result in additional mental anguish for a significant number of women seeking abortions . . *See, e.g.*, [*id.*] at 1347 n. 8 and accompanying text.

Zbaraz v. Hartigan, 763 F.2d 1532, 1537 (7th Cir. 1985) (footnote omitted), *aff'd per curiam by an equally divided court*, 108 S. Ct. 479 (1987). The *Zbaraz* court also listed the "plethora" of cases striking down waiting periods. *Id.* at 1536.

ment. The court's final assertion—that there is no delay if the minor uses the bypass procedure—is utterly irrelevant to the issue at hand: whether a 48-hour waiting period, *applied to those minors who choose to notify their parents of their decision*, imposes an undue burden on the minor's exercise of her constitutional rights.

What is most astonishing about the court's discussion of this issue is its complete disregard of pertinent precedent both in this court and the Supreme Court. Specifically, in *City of Akron* the Supreme Court invalidated a 24-hour waiting period imposed after a woman gave her consent to the abortion *and*, if a minor, obtained the requisite parental consent. *City of Akron*, 462 U.S. at 451.[8] The Court gave no indication that the statute's waiting period would be constitutional as applied to a minor. Similarly, this court has held a 48-hour waiting period applicable to all women unconstitutional, a holding that the state of Missouri did not appeal. *Planned Parenthood Ass'n of Ashcroft*, 655 F.2d 848, 866 (8th Cir. 1981), *aff'd in part and rev'd in part on other grounds*, 462 U.S. 476 (1983). Although these cases did not address the precise statute at issue here, the court fails to explain why their principles should not be controlling here. *Cf. Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127, 1143 (7th Cir. 1983) ("[T]he same objections to the waiting periods for adults listed in *City of Akron* apply to waiting periods for minors.").

As long as the Constitution protects the right of a woman to choose to have an abortion, we are under a judicial mandate to evaluate state regulations in terms of whether they impose undue burdens on the exercise of that right. The majority opinion slights this mandate. Here, in dealing with minors, the court

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8 The ordinance at issue in *City of Akron* provided:

"No physician shall perform or induce an abortion upon a pregnant woman until twenty-four (24) hours have elapsed from the time the pregnant woman, *and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter*, have signed the consent form required by Section 1870.06 of this Chapter, and the physician so certifies in writing that such time has elapsed."

Id. at 424 n.6 (emphasis added).

should also consider whether the state's interest in protecting minors is furthered by the state regulation. The majority slights this concern as well. The majority has proffered no analysis of whether these interests have been served by the two-parent notification rule. The district court's findings remain unrebutted. The judgment of the district court should be affirmed.

HEANEY, Circuit Judge, with whom MCMILLIAN, Circuit Judge, joins, dissenting.

I respectfully dissent. I agree with the district court that the two-parent notification requirement does not serve the state asserted interests. Indeed, it undermines those interests. The statute does not provide an exception for cases of divorce, separation, desertion or other comparable situations. It thus opens the door to creating intolerable tensions for the minor child at a time when he or she least needs additional stress. I also agree that the two-parent notification requirement cannot be saved by the court bypass procedure.

In my view, a single-parent notification requirement would withstand constitutional challenge. It would be a simple matter for the Minnesota legislature to adopt that requirement if it truly believes that a minor will benefit from the counsel of a parent.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5423
No. 86-5431

Jane Hodgson, M.D., et al.,

Appellees,

—v.—

The State of Minnesota, et al.,

Appellants.

Appeal From the United States District Court
For the District of Minnesota.

Filed: October 7, 1988

Judge John R. Gibson:
Order entered pursuant to your directions of 10/7/88.
Linda L. Penberthy: eh
cc: All Active Judges

Before

LAY, Chief Judge, and HEANEY, MCMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL and BEAM, Circuit Judges, en banc.

ORDER

The issuance of mandate is stayed pending the filing of a petition for writ of certiorari with the United States Supreme Court. If the petition is filed, the stay shall continue until such time as the Supreme Court has acted on the case. If the Supreme Court denies the writ or if the time for filing the petition expires without such petition having been filed, the stay will automatically terminate. Judges Bowman, Fagg and Wollman would deny the stay.

A true copy.

Attest:

ROBERT D. ST. VRAIN
CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

EXCERPTS FROM TRIAL TESTIMONY

DR. EDWARD EHLINGER

* * *

*[2025] Q. Can you describe to us what it means that the birth rate for 15 to 17-year-olds is steadily increasing since 1980 while the abortion rate is declining?

A. Well, what that means is that a greater percentage of 15 to 17-year-old women are carrying their babies to delivery and fewer are opting for an abortion.

* * *

[2030] A. Many of the other factors that would affect the birth rate and the abortion rate would affect both the 15 to 17-year-old cohort and the 18 and 19-year-old cohort fairly equally. Looking for things that would affect those two population groups unequally the parental notification law stands out as something that would affect the 15 to 17-year-olds more than it would affect the 18 to 19-year-olds.

Q. In fact, the parental—is it true—isn't it true that the parental notification law afects—does not affect 18 to 19-year-olds at all?

A. Well, the law, as stated, will affect the 15 to 17-year-olds. . . .

PAUL G. GARRITY

* * *

[1321] Q. About how many minor petitions did you hear of the Massachusetts statute since 1980?

A. I have given that some thought. Over 100 and probably less than 200 or almost 200.

* * *

[1325] Q. So in some 200 cases you heard you found maturity in every instance?

A. There was never any question, it wasn't even a close call.

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* Numbers appearing in brackets in text indicate page numbers of original stenographic transcript of the testimony at trial.

* * *

[1328] Q. Did you ever see any minors who had first approached their parents but couldn't have parental consent or were these minors who came because they didn't want to make the initial contact in the first place?

A. I can't recall of a minor who had approached a parent and didn't get consent. There may have been but I can't recall any.

* * *

Q. Do you have any opinion as to what the law is accomplishing in Massachusetts?

Q. It just gives these kids a rough time. I can't think it accomplishes a darn thing. I think it basically erects another barrier to abortion and if abortion is legal, it doesn't seem to me to make any sense to go throught [sic] this barrier which my sense is. . . .

DR. PAUL DUANE GUNDERSON

* * *

[2454] Q. So if nationally 9.5 percent of all women get abortions in the second trimester compared with minors in Minnesota, 23 percent getting abortions in the second trimester, there is a public health problem in Minnesota, is there not?

A. Yes, it is a problem, yes.

Q. And if you look at that first line, 1978 to 1983, the problem for minors is not decreasing, is it?

A. No, there is a slight increase there.

Q. Yes. And the trend, and if you are not familiar please tell me, the trend in the United States, is, as a whole, not Minnesota, is for women to be getting abortions earlier, isn't that true, if you have been reading the CDC?

[2455] A. Yes, overall that is the case, yes.

Q. But Minnesota minors are not participating in that national health trend, are they?

A. Not given the data you have quoted.

Q. Well, it is your data.

A. Uh-huh.

Q. They are not participating in this national public health beneficial trend, are they?

A. That is right.

Q. And that is a public health concern, isn't it?

A. Yes, it is.

JUDGE ELDON J. HALL

[1732] Q. What was the young woman's reason?

A. The young woman's reasoning was extremely mature; she had a keen understanding of her father's emotional makeup and her feeling was if she were to give this information to him it would hurt him terribly, it would crush him, and I believe she loved her father very much and I believe she had a fairly good understanding of what made him tick and felt in this particular situation it would be extreme punishment to him to have this information.

Q. And you believed and accepted the young woman's testimony?

A. After listening to her explanation as to why she formed that conclusion yes, sir, I did.

* * *

[1733] Q. Okay. Do you recall what her reasons were for not wantin to give notice to her parents?

A. Well, I guess the reasons she had for not wanting to give notice to her parents was that in effect she did not have parents to give notice to. The child had been physically abused, physically ejected by both the parents and the brother who was still residing within the home and in fact had been physically and permanently ejected from the home some six to eight months earlier and had had no contact since that time.

* * *

HEATHER P.

* * *

[41] Q. Do you remember after your mom called the clinic how long it was between that time and the time you got an appointment to go into the clinic for an abortion or for the court process?

A. Probably about two weeks.

Q. Do you have any idea why it was that long?

A. Gosh, it could have been because of my mom's job or, you see, I have been through—I have helped my friends, a couple of my friends through abortions and I have also gone through Meadowbrook and I found that court dates, you know, in getting to court you have to kind of wait, you know, you can't just jump in any day you plan to go and have an abortion. You have to wait until that day and so they only take a certain amount of kids because I have called a couple of times to court to help my friends out and you do have to wait a couple of days, you know, in order to get in there, maybe a week or so. So that is maybe why.

DR. STANLEY HENSHAW

* * *

[40] THE WITNESS: This shows that if—if the minors had had the same trends in birth rate compared to the 18 to 19-year-olds as occurred in other states their birth rate would in fact—would have gone down about three more percentage points than it did. So the suggestion is if the law had any effect it appears more likely that the effect was to slow down the decline in the birth rate rather than to encourage a decline in the birth rate of the minors.

[43] Yes. We at the Alan Guttmacher Institute have tried to estimate the number of women who need abortions in each part of the country. The purpose is to assess the adequacy of abortion services. By "need" what we mean is the number of women who would obtain an abortion if services were readily available to her.

Q. And can you make any statement about Minnesota's abortion need and its performance in meeting that need?

A. Yes. We have estimated that the need for abortion services in Minnesota in a year, say 1982, is something over 30,000 women. Now we might want to deflate that a little bit **[44]** because Minnesota is quite a rural state. Rural states more than average anyway a non-metropolitan state. So maybe a little under 30,000 would be my estimate of the number of women in Minnesota who we would estimate have an unintended pregnancy in a year—well, in 1982—and if services were readily available would obtain an abortion.

The number of abortions that actually occurred was on the order of 19,000 in 1982. Our conclusion is that there is a significant amount of unmet need for abortion services in the state.

JACKIE HINES

* * *

[1524] Q. Did she also voluntarily come to you about her pregnancy?

A. Yes.

Q. And could you describe the nature of that communication and what steps you took to comply with the law and how you felt about it?

A. When she came to me and her boyfriend was going to be gone because it was something that he didn't want his parents to know about so he didn't even want to be in town when she went to the clinic. So she had come and asked me if I would go with her and she had already called the clinic and talked to them and found out that she had to have consent by a parent and—which I assumed to mean that she had to have my consent since I was the custodial parent—so we went under the assumption that my consent was all she needed and that is so—since I was going to be going with her I could sign a consent when I got there. Then it wasn't until after we got there and she was already through the counseling and through all the other films and everything else that she was told that she had—where was the consent from her father, which of course we didn't have because, well, I was the one who didn't think that that would be necessary since I had legal custody of her and I didn't have to have his permission for anything else, when I had her tonsils out or anything like that.

* * *

[1526] Q. How did you feel about having to go to court?

A. I was very upset because of the fact that I was—I, of course, being a mother an dfeeling really this is a daughter of mine, and I felt responsible because I had been the one who said my permission is all you need because I am your custodial parent, so I felt as if I was responsible, partly responsible for this extra hassle that she had to go through and the tears, and really she was more afraid of the court than she was of the clinic.

She had no fear at all of the procedure but she was scared to death to go to court because, "What if they say no, what if they make me call dad," that is what the trauma was, not the procedure at all.

* * *

[1527] Q. And so you had to relate the story of your divorce to the judge?

A. Well, I didn't because I didn't want my daughter to hear it, what the gory details were. He accepted the fact that my divorce was based on physical abuse and I didn't have to tell him all about that.

Q. But you had to relate that in front of your daughter this day that she was getting her abortion?

A. Yeah.

Q. How did you feel about having to bring up those details on that day?

A. Well, I didn't think the whole thing was necessary so I was very angry about having to bring up all of this other stuff in addition to what she was there for.

DR. JANE HODGSON*

* * *

[V.I, 54] Q. When you were Medical Director and sought to engage the services of doctors to do abortions at the various abortion clinics, did you have conversations with doctors to become employed at those clinics, after which conversation the doctor refused?

A. Oh, yes, very many. Particularly, this was the case in opening the clinic in Duluth. It was impossible to get local Duluth physicians. It still is. We are—we have to import physicians from Hibbing and Bemidji and—I can't think. It's a town near Grand Rapids. Anyway, small communities some distance from Duluth, all of whom I have trained personally.

* * *

[75] Q. Is it correct to say, then, that your testimony is you tend to use—you consider laminaria medically advisable more often with teenage patients because of the condition of their cervixes than with adult patients?

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* Dr. Hodgson's testimony was given on two days and transcribed as two volumes. The volume number is indicated in the brackets.

A. Oh, very definitely.

* * *

[111] Q. At the Women's Health Center in Duluth where you were Medical Director, what kind of abortions were done?

A. We limited our procedures to 16 weeks. We did not go beyond that.

Q. What would happen to patients who would come in who were over 16 weeks?

A. They were referred to—had to go to Minneapolis.

* * *

[132] Q. Have you had any patients who do not know who their father is?

A. Yes . . . . And there was a two-week delay for one minor simply because when they notified the so-called natural father, he refused to acknowledge his paternity . . .

* * *

[V.II, 11] Q. After this—after August 1st, 1981, how did your medical practice vis-a-vis your minor patients, change?

A. Well, it—it was just one—the law resulted in just one more hurdle that the—the patient had to overcome. There was—it's a very complicated process for a teenager to go through and many of them were bewildered, they—many questions, they didn't understand.

The court—court process was something that was totally unknown to them . . . .

* * *

[V. II, 14] A. Well, it entailed many problems because we had to—because of the—the use of laminaria in the teenagers, for example. It is considered medically advisable in the young, immature patient with a tight, narrow cervix to insert laminaria.

* * *

So the court process added to this meant that there was really much more than could ever be done in a—in one day, particu-

larly where patients had come a long distance, get up early in the morning and drive **[V. II, 15]** to a clinic. They—and it's necessary, according to the court system in—in use at the present time, they have to have a precounseling exam and a—a session and examination and be instructed—given informed consent and go to court; and then come back, get the laminaria, wait four to six hours as a minimum, and have a procedure, nd then to go home a few hundred miles. You see, it's—it's an impossible situation.

So what happens is that in many of the clinics, the laminaria is omitted and the tendency is to—to—for the sake of the patient; otherwise she's not going to get the procedure done at all. So just from the standpoint of time, it made it very difficult.

* * *

[V. II, 23] Q. Have you observed minor patients of yours when they've come back from the court process?

A. Yes, and some of them are wringing wet with perspiration. They're markedly relieved, many of them. The—they dread the court procedure often more than the actual abortion procedure. And it—it's frequently necessary to give them a sedative of some kind beforehand.

* * *

[V. II, 56] A. . . . And I've seen many of the teenagers that hitchhike when I've been working here in the Twin City area, as well as in Duluth. And they will hitchhike in extreme kinds of weather which is another hazard, the sub-zero weather in the winter and the hot weather in the summer, and so—

* * *

[V. II, 59] Q. If a teenager is from a family in Minnesota that receives Medicaid for their medical services,does such Medicaid pay for the teenager's abortion?

A. No. There is—there are no subsidies granted a patient—a teenager who chooses to terminate her pregnancy.

KATHY M.

* * *

[124] Q. That is the way you felt. Were you also worried about time?

A. Yes, because it was—it seems to me like I had one week before the first trimester was over and so that was a lot of stress too, I mean.

Q. What did you and your mom decide to do?

A. We ended up going to Mason City, that is what I decided to do; we ended up going to Mason City which was two days in Mason City, Iowa, excuse me, which was two days, and it was probably $200 more.

MARY J.

* * *

[637] Q. Do you remember any of the things you were thinking while you were sitting there waiting? What did you think?

A. I was very nervous. I was wondering if the judge would even give me permission to do this, which made me very nervous and very scared, just anticipating the procedure, having to wait to go through all of this before I could finally go back to the clinic.

I was worried about if I would say something wrong to influence the judge's decision, to maybe say no to my case, for whatever reasons he may have thought, I don't know.

JUDGE GERALD C. MARTIN

[412] Q. Now I believe you testified earlier that some of the minors come to court accompanied by a parent, is that correct?

A. That is right.

Q. And how many would you say would come so accompanied?

A. About one in ten have their mothers at the hearing.

Q. How about minors who bring another adult with them, does that happen?

A. Yes. There is some times you will see a petitioner with a grandmother or an aunt or with an adult friend that she has consulted with.

Q. What kind of reasons do the minors give for not wanting to notify their parents?

A. It is almost always a case of a very unhealthy family situation. It is frequently a physically and emotionally abusiv father, usually; alcoholic parents; it might be a parent that physically abuses the petitioner, or would blab all over town **[413]** about the situation and we have a lot of small towns around that area. There is often—you see a case where one of the parents is extremely ill, heart condition, or in some sort of nervous situation, receiving treatment for a very nervous disorder, and it is felt if that parent learned about the pregnancy it would be detrimental or even life-threatening for that person.

You often see a case where one of the parents has had very little contact with the child for years after a divorce, maybe they see that parent once a year for the last five years, and never discusses anything important with that parent and doesn't want to have to consult that parent about this.

Those are the most common cases.

Q. Can you give any specific examples of these kinds of situations?

A. Well, the ones that would stick out in your mind are the abusive situations and it is probably the most common type one. In one case about a week or two before the hearing the father had broken the petitioner's mothers wrist and had frequently physically abused both the mother and the petitioner. Another case that I can recall from the range, the father frequently beat the petitioner and she had no doubt in her mind that the same would occur if she notified the father about her pregnancy.

Other than that there is no individual cases that stand out, but that, I think, is a very common situation.

Q. And when the petitioners tell you that they are afraid of **[414]** abuse from their parents, do you believe them?

A. Oh, yes. For sixteen years I have seen a great deal of that and there is no reason for me not to believe that.

JUDGE OLEISKY

[25] Q. You ask the teenagers why they can't tell their parents?

A. Many times I do.

Q. What responses do you get?

A. Oh, numerous. Some—a number of them have told their parent, one of their parents. Others will say that they have been told if they ever get pregnant they will be told to leave the house. Many will be told that there is a lot of strife and stress in their family situation and by telling them that they are pregnant it will just add and accumulate to it.

Others will tell us that there has been an older sister who had an abortion or a baby and it brought all kinds of **[26]** chaotic experiences. Others will tell us that physical and mental harassment by a father, in some cases some have told us they have been sexually molested by a member of the home or the stepfather or the father and that may be the reason that they are pregnant.

Others will tell us that it would create real problems in school, in the community, just a multitude of reasons.

JUDGE GEORGE PETERSEN

[1297] A. . . . That is a number of young women come in and describe a close, trusting, loving, innocent relationship between themselves and their parents that they want to retain. They don't want it damaged, they don't want their parents to lose faith, lost trust, lose respect for them so they ask me not to require them to notify their parents . . . .

Young women would say their parent is against abortion and would make her keep the child under threat of something or other; or against abortion, would kick her out of the home, have said so in the past, have done it with a sibling or have remarked about a relative.

Adding to problems at home would be a parent with a severe heart condition or severe health condition or a father who has just lost his job or a parent who is in the process of getting divorced and this would simply add to their problems and the child feels some responsibility not to do that.

Parent not a part of her life is relatively confined almost exclusively to a situation where parents are divorced and that is in reference to the noncustodial parent and the others are pretty self-explanatory, prior abuse, fear of alcoholic parents or the child has been raped.

* * *

JUDGE NEIL RILEY

[2008] Q. Were some of the minors that you saw accompanied by at least one parent?

A. Yes. Not infrequently the mother would accompany them.

Q. When the mother did, did you allow the minor to come [2009] into your chambers with the mother when you held these hearings?

A. Always.

Q. Did you ever question the mother as to the circumstances as to why she was there?

A. It was always pretty self-evident. Quite universally the explanation was that the father would beat up the child and raise unshirted hell if he were to know about it.

Q. Did you believe the mother?

A. I thought she was in the best position to know, yes.

SHARON L.

* * *

[725] Q. Do you remember anything about how long you waited for a court appointment, like between the time you called the clinic?

A. I would say about a week, week and a half.

SUSANNE SMITH

* * *

[35] Q. Based on your experience with the abuse field, do you think that child abuse is generally unreported?

A. Yes, that is what all the people in the field strongly believe.

Q. And you personally believe that?

A. Yes, I do.

Q. So it is your testimony, is it not, that those teenagers who are in a situation where there has been family abuse are not able or do not avail themselves of that exception in the statute?

A. With the teenagers we have seen in court, that is true.

* * *

Q. Do you have an opinion as to whether you believe going through the court process and seeing the guardian—now you have interviewed the teenagers personally—is difficult for teenagers?

A. It appears to be very difficult for them, yes.

Q. What is the basis for your opinion?

A. The teenagers that we see in the guardian's office are very nervous, very scared. Some of them are terrified about court processes. They are often exhausted, particularly if they have been driving around Minneapolis looking for the building . . . .

* * *

[36] I had a teenager tell me last week when I was describing to her the location of the building, when I said the word Juvenile Justice Center she said I feel like a criminal and I think that is pretty typical of the reaction that the kids have when they find out they have to go to court.

JUDGE WILLIAM R. SWEENEY

[1037] Q. What kind of reasons do the minors that you have seen give for not wishing to notify their parents?

A. I don't have a very great sample, but the cases I have heard, there seems to be a fairly common thread among probably among the majority of the cases where there is some form of either religious or philosophical opposition to abortion per se, coupled with, and this is what is so strange, I don't understand it, coupled with the threat to punish the child for becoming pregnant.

They say they are opposed to abortion, consider it murder, but they say my parents tell me if I get pregnant I am going to disown you, throw you out of the house; I will never see you again, those kind of things. In one case the adoptive daughter of the parents that she wished not to notify was also her physical means of support. She worked for the parents in a business and she was afraid that she would be canned and that would be the end of whatever support she could raise for herself to pay for a college education.

[1038] Anyway, that seems to be a very common thread. There is in some cases physical abuse on the child, in some cases in those cases there has also been spousal abuse. In some cases there is a problem with alcohol. But the common thread seems to be, and even a more common thread perhaps, and I should have mentioned this, even a more common thread seems to be an inability to communicate with parents. It seems to be a common thread to all of the cases.

Q. And when the minors tell you these reasons for not wanting to notify their parents, do you believe them?

A. Yes. I am trying to think of one that I thought was trying to pull the wool over my eyes and I always worry about that because of the very high pressure situation they find themselves in; I did not get that feeling or have that—form that opinion about any of them.

THOMAS P. WEBBER

* * *

[619] THE WITNESS: The organizations before the Senate included Minnesota Citizen Concerned For Life. Before the Senate and the House organization it tended to be quite similar

and Minnesota Citizens Concerned For Life, the Minnesota Catholic Conference and Health Care facilities, the St. Paul—Minneapolis-St. Paul Archdiocesan Council of Catholic Women, the Human Life Alliance, Citizens for Community Action, Minnesota—I can explain who these groups were if they mean anything to you, Citizens for Community Action is a group that opposes Planned Parenthood's provision of abortion care.

Minnesota Citizens Concerned For Life is the largest antiabortion organization in the state.

The Human Life Alliance is much smaller but somewhat more strident antiabortion organization. All of them testified. In . . .

* * *

[619] . . . addition to them a group, Minnesota Legal Forum, which at that time, 1981 was Minnesota's local affiliate of Phyllis Shafley's group organized to oppose—

THE COURT: ERA? Minnesota Equal Rights?

THE WITNESS: The Minnesota Eagle, the bird, forum, the Minnesota Eagle Forum; CALM, the acronym stands for Citizen Alert for Liberty and Morality; a group organized by the pastor of the Fundamentalist Church in St. Paul, initially . . .

* * *

[621] Q. Would you—I am still in the offer of proof—would you please tell us who testified against the bill in either the House, Senate or both?

A. The organizations testifying against both of the bills included the Minnesota Medical Association, the Minnesota Public Health Association, the Minnesota Nurses Association, Planned Parenthood of Minnesota, the Division of Adolescent Medicine at the University of Minnesota, the St. Louis County Health Department, the American Association of University Women, which introduced a very understanding study into testimony; the Lutheran Social Services—the list went on, it was

quite a lengthy list of all of those organizations who did in fact testify along with some individuals.

* * *

[674] THE COURT: Before you leave that, who does provide second trimester, Ramsey County?

THE WITNESS: Second trimester abortion services are available through the Fertility Control Clinic at the St. Paul Ramsey Medical Center. There are other proprietary providers in Hennepin County as well. To our knowledge the only one in Ramsey County, which is where our clinic is located, is the Fertility Control Center at the hospital.

BY MR. PENTELOVITCH:

Q. And no private providers?

[675] A. No, none of the private providers. Meadowbrook Womens Clinic in St. Louis Park, which is a proprietary provider does provide second trimester abortion services as to [sic] some individual physicians, but none on a not-for-profit basis.

KATHRINE REICHE WELSH

* * *

[137] Q. What is the timing involved for minors when you send out notifications, taking into considerations your varying clinic schedules?

A. Sometimes that is a problem because we have to send it out like 48 hours before, so if a woman would call us on Monday and want to get in on a Wednesday, if she called after 12:00 on Monday there would be no way that we could get her in on the Wednesday clinic because we would have had to have mailed the letter before noon and so then we could, you know, we would have to put her on like a Friday clinic or a Saturday clinic.

Q. But isn't it true sometimes you don't have a Friday or Saturday clinic?

A. That is true. The Wednesday clinic is the only clinic that I know that we are always going to have, our Wednesday clinic.

Q. So if a minor calls on Monday morning you might not be able to see her until the next week?

A. If we don't have a clinic, that is true; if she chooses the mail notification.

* * *

[165] Q. Are any of these physically ill?

A. I have had two or three that have vomited, yes.

Q. In the courthouse?

A. Yes.

Q. Have you had any minors who have had medical problems but have had to go through the court?

A. Yes, we did, and that was in Judge Oswald's chambers. I had to bring a nurse with us and Judge Oswald heard her and the mother was with her and what we were worried about is that even though she was electing to have an abortion when we got there we found out she had some physical problems and that she was starting to spontaneously abort and yet we could not do the procedure until we took her to court.

* * *

[219] Q. How did she comply with the law?

A. The mother came with her and we required a death certificate of the father.

Q. Do you know where the father died?

A. In Massachusetts.

Q. And did they have a death certificate in Minnesota or did they have to get it from Massachusetts?

A. They had to obtain it from Massachusetts.

* * *

[220] Q. Was there a delay in the abortion because of the time to get the death certificate?

A. Yes, there was.

PAULA WENDT

* * *

[21] Q. So the two-day D&E procedures get the laminaria and stay in the Minneapolis area?

A. Right.
Q. Overnight?
A. Right.
Q. How much does an abortion cost at Meadowbrook?
A. If she is under 12 weeks the cost is $225. From 12 to 14 weeks it is $275.

THE COURT: Now you break it at 14 weeks?

THE WITNESS: We have two different fee categories.

THE COURT: All right.

THE WITNESS: A lot of people wouldn't do it all exactly the same way but we do. 14 to 16, $395; 16 to 18, $450; 18 to 19, $550; and 19 to 21, $650.

* * *

[23] Q. What percent of your adult women get second trimester abortions?
A. About 10 percent of our adult women.
Q. What percent of your minor patients get second trimester abortions?
A. About 25 to 28 percent of our minors do.
Q. Referring to the time period between October and December 1985, the last three months of 1985, do you remember how many minors you saw?
A. We saw 200.
Q. Do you know what percent were in the second trimester?
A. Let's see, it was over 30 percent.

* * *

[27] . . . We are also somewhat unusual in that we do a lot of second trimester abortions so we will see a fair number of women who have gone somewhere else for an abortion and turned out to be too far along for that particular clinic or doctor and then will be referred to us.

BY MS. BENSHOOF:
Q. For example, where?
A. Oh, Fargo, Duluth, Sioux Falls.
Q. You mean the doctors there will refer patients that they already have?

A. Right.
Q. Down to Meadowbrook?
A. Right, right; which fits in another delay for these patients.

* * *

[61] A. . . . We don't have the kind of time to spend with her talking about her relationship with her parents, her relationship with her boyfriend, how she feels about sexually active at 16, what are her thoughts about contraception. We still do it all but we used to have more time to it before. I think that we used to establish more of a relationship with her.

I think that part of what we do is we are sort of role models and teachers for them because they are young women who are sexually active and they got pregnant and they are having an abortion and some of them aren't very good contraceptors yet and they are good medical consumers yet so we try to do a lot of them with our young women and the law makes it a lot harder for us, makes it a lot harder for her to get what she needs.

Q. When you counsel a minor at 7:30 in the morning, who mght have been up driving for two hours, are her concerns in counseling on the abortion or the court?
A. Her concerns are not on the abortion until she comes back. It is like they put it on hold until they come back. They will go to court and be very determined about that but they are very afraid they are going to denied and they always want to know what the judge is going to ask me and is he going to let. . .

* * *

[99] Q. Could you explain the circumstances of that case?
A. It was a very young woman; she was 13, who came in with her boyfriend and they went to court alone and she was terrified of court and she wouldn't talk to anybody. So they would not sign the petition.
Q. You mean literally not talk?
A. Literally not talk. So she came back to me and this was a pretty bad situation because she lived with her father and there

were a lot of problems in the family and it was important that she obtain an abortion.

* * *

[106] Q. Can teenagers get one-day D&E procedures when they have to go to court?

A. They cannot.

Q. Why not?

A. Because they have to be in court at 10:30 in the morning. We insert all the laminaria between 9:30 and 10:00 o'clock in the morning. Once you put the laminaria in the cervix the abortion has begun and we can't insert laminaria and send them downtown to go to court because their petitions have not been approved yet. So for the teenager women who go to court what would be a one-day process for her will become a two-day process.

* * *

[108] A. . . . [T]hey don't have the same sort of freedoms that I do, they don't have the money, the time, the privacy. They will come, it is not infrequent, to have Methodist security tell me that they found some of my patients sleeping in their cars in the parking lot or they spent the night in the hospital lobby. I forget they sometimes don't have money for food and motel, you know, so they will do anything to get these arrangements taken care of.

CYNTHIA J.

* * *

[35] Q. And had you not had to secure the court permission and go through all that resulted in that and was involved with that, would you have been able to secure your abortion in the period of one day?

A. Yes.

Q. Would you have been able to secure the abortion at Planned Parenthood, a first trimester abortion?

A. Yes.

BONNIE L.

* * *

[7] A. She told me to call Hennepin County and tell them how far along I was and that it was really necessary that I get in within the week because if I didn't get in within the week it would probably be too late for me to get an abortion at Planned Parenthood.

Q. Within the week, you mean by the end of that [8] particular week?

A. Well, she had kind of, she had emphasized on Thursday. That was the next day. And so she was just hoping on Friday by the latest, so—

Q. So you were talking to her on Wednesday now?

A. Yes.

Q. She was hoping you will get a court hearing on Thursday?

A. Yes.

Q. Did you call the number that she gave you?

A. Yes, I did.

Q. When did you call?

A. I called Wednesday. Right after I talked to Sherry.

Q. And did you get somebody down in Hennepin County Court?

A. Yes, I did. I talked to a lady and told her my situation and she said she didn't have an opening until Monday morning. And I told her that that would be too late, and asked if she had any other openings. And she said she didn't. I called back Sherry and told her that. Sherry tried contacting them.

* * *

[9] Q. Now, then you called Sherry back you said?

A. Yes.

Q. And you explained to her what happened, I take it?

A. Uh-huh.

Q. Then what happened next?

A. She called them to try to get an appointment and she didn't. She must not have had any luck. She called me back and gave me the Ramsey number or the courthouse.

* * *

A. Yes. She said she didn't have any luck either. Then I called Ramsey and I told them the exact same thing I told Hennepin County and they said they could get me at on Friday at 2:30.

Q. They couldn't do it any earlier that that?

[10] A. No. Friday was the earliest they could do it.

Q. All right. What did you do? Now that is still on Wednesday?

A. Yes, this is.

Q. So then what happened?

A. So after I got everything situated with Ramsey, I called Sherry back and told her everything was fine, you know, with them. Thursday I had to go to counselling.

* * *

[14] Q. Now, did you have an appointment at Planned Parenthood to go ahead and have the abortion procedure?

A. Yes. I did on Monday.

Q. Go ahead and tell us what time the appointment was for?

A. The appointment was for 9:30 and I went in and had a little more counselling. I had a checkup and just their basic exam and I went in there to get it and Dr. Hanson sized me again, sized me and said I was too far along and I wouldn't be able to have it at Planned Parenthood.

Q. What do you mean by too far along?

A. I was over the 14 week Planned Parenthood would do. They do up to 14 weeks pregnancy.

* * *

[19] Q. Bonnie, if you had been able to get a court appointment when you first called Hennepin County within, let's say, the next day, do you know whether or not you would have been able to have the abortion procedure either Thursday or Friday of that week?

A. I probably would have had it Thursday.

PERCENT ABORTIONS IN SECOND TRIMESTER
MINNESOTA RESIDENTS

Age	Year					
	1978	1979	1980	1981	1982	1983
< 17	18.4	18.7	21.9	20.1	20.6	23.0
18-19	14.7	14.0	16.6	15.1	15.2	16.0
20-24	10.0	10.4	11.2	10.3	10.6	11.0
25 +	7.8	7.5	8.5	7.5	8.0	7.9
Total	11.7	11.6	13.1	11.5	11.5	4.4

LIVE BIRTHS AND INDUCED ABORTIONS TO WOMEN AGE 15-19

MINNEAPOLIS, 1980-1984

AGE 15-17

Year	Population[1]	Live Birth #	Live Birth Rate[3]	Abortions[2] #	Abortions[2] Rate[3]	Pregnancy Rate[3]
1980	6,759	264	39.1	296	43.8	82.9
1981	6,548	270	41.2	253	38.6	79.8
1982	5,877	251	42.7	202	34.4	77.1
1983	5,289	250	47.3	N/A	N/A	N/A
1984	4,933	267	54.1	N/A	N/A	N/A

[1] 1971-1979 population estimates are derived using linear interpolation from the 1970 and 1980 census. Estimates from 1981-1984 are from the Hennepin County of Planning & Development

[2] Reported abortions are from the Minnesota Abortion Surveillance System developed in 1974 by the Minnesota Center for Health Statistics

[3] Rates are per 1000 population. The pregnancy rate is the sum of live birth rate and the abortion rate.

Health Statistics & Management Information
Minneapolis Health Department
January 16, 1986

LIVE BIRTHS AND INDUCED ABORTIONS TO WOMEN AGE 15-19

MINNEAPOLIS, 1980-1984

AGE 18-19

Year	Population[1]	Live Birth #	Live Birth Rate[3]	Abortions[2] #	Abortions[2] Rate[3]	Pregnancy Rate[3]
1980	7,628	480	62.9	585	76.7	139.6
1981	6,783	441	65.0	537	79.2	144.2
1982	6,749	445	65.9	458	67.9	133.8
1983	6,744	392	58.1	N/A	N/A	N/A
1984	6,248	394	63.1	N/A	N/A	N/A

[1] 1971-1979 population estimates are derived using linear interpolation from the 1970 and 1980 census. Estimates from 1981-1984 are from the Hennepin County of Planning & Development

[2] Reported abortions are from the Minnesota Abortion Surveillance System developed in 1974 by the Minnesota Center for Health Statistics

[3] Rates are per 1000 population. The pregnancy rate is the sum of live birth rate and the abortion rate.

Health Statistics & Management Information
Minneapolis Health Department
January 16, 1986

HENRY DAVID

[13] Q Are there any studies in the United States comparing only adolescents who give birth, or who have abortions, in a controlled study, for example in one particular hospital?

A Well, there was a study done in the State of Hawaii which is the only study which comes close to that and that was a study done by Dr. Patricia Steinhoff (ph) from the University of Hawaii, and it was published very recently. I have an advance [14] copy of the paper and they found, they checked their records for the years 1978, 1980, and found 313 abortion cases and 393 controls—by controls being women who delivered.

Q These are only adolescents?

A Yes. Well, they are young women, which means they may go up to age 24. I will be glad to mention some of the conclusions if you wish.

Q Yes, please.

A I will read: "The data provides striking evidence that women who utilized abortions were able to realize their family goals. They avoided subsequent unwanted pregnancys, subsequent births were overwhelmingly intended and wanted, and occurred in a positive emotional atmosphere. Among the very young women"—this would be women 15 to 17—"the use of induced abortions leads to postponement of the first birth well beyond the second birth of the women in the control group." In other words, those women who delivered had a second child fairly rapidly after the first; whereas the woman who had the abortion was able to delay it longer. And it raised the social, educational, and economic level of the household and the subsequent family.

That is the only study ever done in the United States with control groups, and it was possible to do so in Hawaii because it was possible to follow people up; and they were all recorded in this one hospital and it was done by the University of Hawaii.

[19] Q Based on your original research what are the developmental effects of carrying an unwanted pregnancy to term?

A That is a very difficult topic also because there are very many different opinions; but the only actual control study that has ever been published and repeatedly, and we are working on

a book on it now, is this twenty year follow-up study of children who were born to women twice denied abortion for the same pregnancy.

Q I want to say that we were very careful in matching the process. A research person devoted a whole year to matching the children and every one of our study children as we call them is matched by a control child whose mother did not request abortion, who was preferably in the same classroom or the same school, same sex, same age, same birth order, same number of siblings; the mothers matched for socioeconomic status, and the father present in the home. We have followed these children very extensively, psychologically, medically and every other way.

THE COURT: This is in Czechoslovakia?

THE WITNESS: In Czechoslovakia and again, because Czechoslovakia has a population register it is very easy to see which of our children came to the attention of school authorities, which children went to jail, which children were picked up or later when they became young adults were picked up for [20] alcoholism and all these things and the most significant finding is, in a nut shell, that many of the differences which were not statistically significant at age nine, subsequently became statistically significant.

It is also of interest that not one of the study children was ever selected as best friends by any other child in the classroom. We had psychiatrists and psychologists and public health people interview the teachers, the children, both sets of parents, and I might add here that this study is known in Czechoslovakia as a child development study, no one knows that there is any connection for abortion, and in fact 35 percent of the women who originally twice asked for abortion, the very last question of the interview always was did you ever ask for an abortion and 35 percent of the mothers subsequently denied it, which is quite normal, of course.

In a nut shell the summaries indicate that statistically significantly fewer children went to second school too.

Q Step back one minute. You mean fewer of those whose mothers had unwanted pregnancies?

A Correct, went on to secondary education. And they believe today that their position in life is worth far more high in actual psychiatric attention. This was already evident in the early years when a significantly larger number came to the attention of the Prague psychological clinics.

Let me just say, to make this short, that we cannot **[21]** predict in advance which child will get into psychological or psychosocial difficulties, who will go to jail, become alcoholic or such, but in the aggregate there was a statistically significant difference and the conclusion of the study, and I will be glad to provide further details, was that a woman's request for abortion needs to be taken seriously and that the chances of adverse developmental effects are pretty, pretty strong.

DR. LENORE WALKER

[308] Q Would you say that adolescence, as compared to other stages of childhood, is a particularly vunerable point insofar as a battering home?

A It is really a very vunerable point, one, because there is a great deal of sexual abuse and a lot of sexual jealousy for the batterer, so just the very being of at that time adolescent sex such as dating, a prom, they don't want their wifes to go out and certainly not their children. They want to keep everybody inside that home and that causes a great deal of violence and conflict in those homes.

In addition, I find that in the violent homes adolescence increases the amount of physical abuse; that when you study families over the life span you find two specific times when violence is the highest. One is in pregnancy and the very early stages of a child's life, the first few months; and the second is at adolescence, two points, and we don't really understand all the causation, but if you plot that all out on charts thatis what it shows.

Q Have you or others studied any correlation between pregnancy and violence?

[309] A I have studied some in my research program and we found about one third of our subjects were submitted to terrible

violent battering incidents during pregnancy. Richard Gillis (ph) another researcher from Rhode Island also studied it and found a very high rate of violence that increased during the period of pregnancy.

Q You are talking in terms of pregnancy of the wife?

A That is correct.

Q What about pregnancy of the teenage daughter?

A There has been very little research that I have seen about pregnancy during—of an adolescent daughter. However, the theoretical implication would be that it would be very high were we to study it and that would be part of the high figures of child abuse and general high levels of violence that increases when children are adolescents.

Q What would you expect the effect of notice of a daughter's pregnancy to have on a batterer?

A I think it would absolutely enrage him. It would be much like showing a red cape to a bull. That kind of information just plays right into his worst fears and his most vunerable spots.

The sexual jealousy, his dislike of his daughter going out with anybody else, would make him very angry and would probably create severe abuse as well as long term communication difficulties. In some cases the man may not react impulsively **[310]** and may hold on to that kind of information. But during the next fight it would certainly be used as a weapon and would continue to be used for years.

DR. JANE HODGSON

[82] Q In evaluating pregnant teenagers, could you explain the risks of—what the particular risks are with continuing the pregnancy and going through childbirth for a teenager, as opposed to being able to obtain an abortion?

I think you could start out your answer to that question by just what are the risks to the health of a teenager who is carrying through a pregnancy and childbirth.

A Well, the risks to a teenager are greater, of course, than they are for an adult simply because nature didn't intend it that

way, even though women—even though teenagers are achieving menarche at an earlier age now than they did a few decades ago.

It's been estimated that the age of menarche is decreasing about four-tenths of a year every decade. And at the beginning of the century, women didn't begin menstruation until they were over 15. The average age was about 15.6 years, I believe. And now it's down to 12, a little over 12, just in the—within this last century.

But they're,—when you see some of these children, it's obvious that they can't go through a pregnancy without having considerable distortion, from a physical point of view.

They're—they're apt to develop varicose veins. They develop abdominal changes in their—their **[83]** physique; muscle changes, abdominal changes. They lose the elasticity of their skin, the muscle—the elastic fibers are ruptured. They develop cardiovascular problems. They can have severe toxemia, which is based upon stress, which, of course, is always greater in the teenage pregnancy because of the social aspects. They may develop molar pregnancies.

I recall very vividly one of my first patients in Saint Paul was a 16-year-old that came in with a blood pressure of 200 and she had—as it turned out, we diagnosed a molar pregnancy.

Q Which is what?

A Which is a—it's a overgrowth of the afterbirth which destroys the—the fetus, per se, but the pregnancy continues and it's very—can be very dangerous. And this girl was really very seriously ill until we emptied her uterus of the molar pregnancy and she later recovered, but she was running a very dangerously high blood pressure and she could have had a cardiovasular accident and had a stroke or—or any number of complications; heart failure.

Q And do you think that the chances of developing such a pregnancy are higher in teenagers than adult women?

A The incidence of toxemia is definitely higher in the teenager. And the—

[84] Q Is molar pregnancy related to toxemia?

A Molar pregnancy causes—will cause toxemia. Yes, they can be related. They—

Q Are there differences in mortality rates for teenagers or for younger teenagers compared to the general adult woman population?

MR. GALUS: Excuse me. What kind of mortality rates?

MS. BENSHOOF: Death.

MR. GALUS: Abortion or birth or—

THE WITNESS: Maternal.

MS. BENSHOOF: Maternal.

MR. GALUS: Thank you.

A Maternal mortality rates do run higher for the—for the teenager and—very slightly, however. And it has been argued that this is due to the fact that they don't have good prenatal care. And in—with select groups, they have been given special attention and watched very carefully through their prenatal period and the results are supposedly the same.

But it's just the nature of the teenager that they're not going to seek prenatal care early. They're not going to watch their diet. They tend to be very careless about **[85]** nutrition and dental care and observing all the rules of good prenatal care. And it's pretty difficult to make them all conform to this pattern.

Obviously, with an unwanted pregnancy, a patient is not motivated nearly as much to take care of themselves as an adult who is very much seeking that pregnancy.

So we see that—that teenagers are—are careless. They don't eat properly. They don't seek—they don't go to the doctor. They wait until the very last minute, if they have any prenatal care at all, and so the results are that the morbidity and the mortality rate is slightly higher in this group.

Q Do you have any idea about how much higher the risk of death is for teenagers under the age 15 compared to adult women?

MR. GALUS: Excuse me. What is—what is meant by adult women in that question?

MS. BENSHOOF: Women 20 to 24.

A Well, according to the statistics from the National Center for Health, from teenage—no, this is from "Teenage Pregnancy in Minnesota," actually. It's a—it's a—

[86] Q State.

A —publication—

Q From the State.

A From the State, in nineteen—1982. "Teenage Pregnancy in Minnesota." And they point out and these figures were originally obtained, I'm—I think from the National Center for Health Statistics and CDC. The children that—that the adolescent female is three and a half times more likely to die from toxemia of pregnancy than—than pregnant females in their twenties.

Q Excuse me. How many times?

A Three and a half times.

Q Isn't that one and a half (indicating)?

A. Well, that's—I'm sorry, I read—yeah, it is one and a half.

Q Right.

MR. GALUS: Excuse me, counsel. What exhibit are we referring to?

MS. BENSHOOF: This is not an exhibit.

MR. GALUS: Could—could I please see what the witness is referring to?

MS. BENSHOOF: Sure.

MR. GALUS: Just to get it identified.

MS. BENSHOOF: She identified it as a page from—

[87] THE WITNESS: Page 42 from—

MS. BENSHOOF: —"Teenage Pregnancy in Minnesota," which is one of the defendants' exhibits.

MR. GALUS: Thank you.

MS. BENSHOOF: If you want to put it in, you can.

MR. GALUS: No, I'm—I'm just trying to follow the testimony.

A The pregnant female is one and a half times more likely to die from toxemia. She's three and a half times more likely to die—the female under 15 is three and a half more times likely to die from toxemia. Those from 15 to 19 are one and a half times. I'm sorry to get that confused. They're 1.3 times more likely to develop anemia; and, of course, their nutritional reserves are depleted.

Q And is there a general maternal mortality figure for women under 15 compared to women 20 to 24?

A Well, this report claims that the maternal mortality is 60 percent higher for women under 15, and 13 percent higher for women 15 to 19 than for women 20 to 24.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

THIRD DIVISION

3-81 CIV 538

JANE HODGSON, M.D.; GORDON DITMANSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE; ALICE ROE; DIANA ROE; NADINE T., JANET T., and ELLEN Z., individually and on behalf of all other persons similarly situated; LAUREN Z.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a non-profit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a non-profit Minnesota corporation; and WOMEN'S HEALTH CENTER OF DULUTH, P.A., a non-profit Minnesota corporation,

Plaintiffs,

v.

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Defendants.

American Civil Liberties Union Foundation, by JANET BENSHOOF, Esq. and DELSIA MARSHALL, Esq., New York, New York; Minnesota Civil Liberties Union, by LINDA OJALA, Esq., Minneapolis, Minnesota; and Mackall, Crounse & Moore, by FRANZ P. JEVNE, III, Esq., Minneapolis, Minnesota, appeared for plaintiffs.

Hubert H. Humphrey, III, Attorney General, State of Minnesota, by JOHN GALUS and PETER M. ACKERBERG, Special Assistant Attorneys General, St. Paul, Minnesota, appeared for defendants.

MEMORANDUM ORDER

This matter comes before the court upon defendants' motion for partial summary judgment as to all of plaintiffs' claims concerning the parental notification/judicial bypass procedure of 1981 Minn. Laws ch. 228 (codified at Minn. Stat. § 144.343 subd. 6). Subdivision 6 requires, before an unemancipated minor can obtain an abortion in Minnesota, that either both parents be notified or, alternatively, that a state court judge determine that the pregnant woman is mature and capable of giving informed consent to the proposed abortion, or, if the woman is not mature, that an abortion without notification of her parents would be in her best interests.

Plaintiffs, a class of minor women seeking abortions, a parent of a minor, four clinics, and three doctors who perform abortions, commenced this action on July 30, 1981, seeking injunctive and declaratory relief. On July 31, 1981, this court temporarily restrained enforcement of subdivision 2 of Minn. Stat. § 144.343, which would have required written notice to both parents before an abortion could be performed upon an unemancipated minor. Thus, on August 1, 1981, subdivision 6 of Minn. Stat. § 144.343, which requires that a minor obtain either parental notice or judicial approval prior to having an abortion, went into effect and has remained in effect since that date. On March 22, 1982, this court preliminarily enjoined subdivision 2 but denied a preliminary injunction of subdivision 6.

Plaintiffs raise three claims concerning the notification/judicial bypass procedure. First, plaintiffs allege that the notification/judicial bypass procedure deprives them of liberty without due process of law in violation of the fourteenth amendment, both on its face and as applied. Amended complaint ¶ 50. Second, plaintiffs allege that the notification/judicial bypass procedure deprives them of equal protection of the laws in violation of the fourteenth amendment. *Id.* ¶ 51(a), (b). Finally, plaintiffs allege that the notification/judicial bypass procedure violates various provisions of the Minnesota Constitution. *Id.* ¶¶ 53, 54.

I. Summary Judgment Standard

The standards governing summary judgment are well established. Under Fed. R. Civ. P. 56(c), the district court shall render summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Eight Circuit Court of Appeals has emphasized the drastic nature of the summary judgment remedy, finding it appropriate only if "the moving party has established his right to a judgment with such clarity as to leave no room for controversy and the non-moving party is not entitled to recover under any discernible circumstances." *Camfield Lines, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1364 (8th Cir. 1983) (quoting *Butler v. MFA Life Insurance Co.*, 591 F.2d 448, 451 (8th Cir. 1979)). All evidence must be viewed in the light most favorable to the non-moving party. *Adickes v. S. H. Cress & Co.*, 398 U.S. 144, 158-59 (1970). The court must give the non-moving party the benefit of all reasonable inferences to be drawn from the underlying facts. *Trnka v. Elanco Products Co.*, 709 F.2d 1223, 1225 (8th Cir. 1983). However, this court recognizes the remedy's salutary purpose of avoiding useless, expensive and time-consuming trials. *Id.*; *Percival v. General Motors Corp.*, 539 F.2d 1126, 1129 (8th Cir. 1976).

II. Due Process

A. Facial Constitutionality

In addressing the facial constitutionality of Minnesota's notification/judicial bypass procedure under the due process clause, the court is presented with a legal issue which can properly be resolved on a summary judgment motion. Fed. R. Civ. P. 56(c).

In a series of recent cases, the United States Supreme Court has addressed the constitutionality of parental notice or consent requirements and alternative judicial bypass procedures as prerequisites to a minor's receiving an abortion. *See Planned Parenthood Association v. Ashcroft*, 103 S. Ct. 2517 (1983); *City*

of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983); *H. L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*); *Bellotti v. Baird*, 428 U.S. 132 (1976) (*Bellotti I*); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). The relevant legal standards, in the words of the Supreme Court, "are not in dispute." *City of Akron*, *supra*, 103 S. Ct. at 2497-98.

In *Bellotti II*, the Supreme Court struck down as unconstitutional a Massachusetts statute requiring judicial approval in lieu of parental consent. The Court concluded that although the Massachusetts statute satisfied constitutional standards in large part, it fell short in two crucial respects. First, it permitted judicial authorization for an abortion to be withheld from a minor who was found by the hearing court to be mature and fully competent to make the decision independently. Second, it required parental consultation or notification in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she was mature enough to consent or that an abortion would be in her best interests. 443 U.S. at 651.

Justice Powell, in announcing the judgment of the court and delivering a plurality opinion joined in by three other justices, characterized his discussion of possible alternative approval procedures as an "attempt to provide some guidance as to how a State constitutionally may provide for adult involvement—either by parents or a state official such as a judge—in the abortion decisions of minors." *Id.* at 651-52 n.32. In dictum, the Powell plurality opinion sets forth these constitutional guidelines:

> We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision indepen-

> dently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation.

Id. at 647-48. Although the guidance expressed in the Powell plurality opinion represents the views of only four Justices, it appears that a fifth Justice, White, who dissented in *Bellotti II* on the ground that he found the Massachusetts statute to be constitutional, would also find this less restrictive version constitutional as well. *Id.* at 656-57 (White, J., dissenting); *see also Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1010 n.6 (1st Cir. 1981).

The judicial bypass procedure outlined by Justice Powell in *Bellotti II* has been specifically endorsed by the Court in subsequent decisions. *See Ashcroft*, *supra*, 103 S. Ct. at 2525-26; *City of Akron*, *supra*, 103 S. Ct. at 2497-99. In *Ashcroft*, the Supreme Court affirmed the constitutionality of a Missouri parental consent/judicial bypass procedure conforming to the *Bellotti II* standards. *See Ashcroft*, *supra*, 103 S. Ct. at 2526, *aff'g* 655 F.2d 848, 857-60 (8th Cir. 1981).

Likewise, the Minnesota notification/judicial bypass procedure, Minn. Stat. § 144.343 subd. 6, satisfies the constitutional requirements expressed in *Bellotti II*. Subdivision 6(c)(i) requires a judge of a court of competent jurisdiction, after an appropriate hearing, to authorize a physician to perform an abortion upon a pregnant minor without parental notification if the judge determines that the pregnant woman is mature and capable of giving informed consent, or, if not mature, that an abortion without parental notification would be in the pregnant woman's best interests.

Plaintiffs' present four objections to the facial constitutionality of the Minnesota notification/judicial bypass procedure under the due process clause. First, plaintiffs suggest that Minnesota's parental notification statute raises different constitutional issues from the parental consent statutes analyzed by the Supreme Court in *Bellotti II*, *Akron*, and *Ashcroft*. This court

disagrees. The requirement of parental consent is more of a burden on a minor's right to choose an abortion than a requirement of parental notification. Thus, any parental notification/judicial bypass procedure which meets the Supreme Court's constitutional test established for parental consent/judicial bypass procedures is constitutional. *See Indiana Planned Parenthood Affiliates Association v. Pearson*, 716 F.2d 1127, 1131-32 (7th Cir. 1983) (applies Supreme Court's constitutional analysis respecting consent bypass procedures to constitutional analysis of notification bypass procedures).

Second, plaintiffs argue that the two parent notification requirement of the Minnesota statute unconstitutionally burdens a minor's right to seek an abortion. The Supreme Court, however, in *Bellotti II*, suggests that a state may require a pregnant minor to obtain both parents' consent to an abortion as long as it provides an alternative procedure whereby authorization for the abortion can be obtained. *Bellotti II*, *supra*, 443 U.S. at 648-49. Accordingly, this court sees no constitutional infirmity with a two parent notification requirement.

Third, plaintiffs contend that any decision on the "facial" challenge to the Minnesota statute is premature at this time because it is inherently intertwined with the "as applied" challenge. Plaintiffs provide no support for this proposition in the context of parental consent notification/judicial bypass statutes. In fact, a number of courts have upheld the facial constitutionality of analogous statutes without addressing the constitutionality of the statute as applied. *See*, *e.g.*, *Ashcroft*, *supra*, 103 S. Ct. 2517; *Planned Parenthood League v. Bellotti*, *supra*, 6-1 F.2d at 1011. This court therefore rejects plaintiffs' argument and will rule on the facial constitutionality of the challenged statute.

Finally, plaintiffs assert generally that the Minnesota statute lacks procedural protections. Once again, this court cannot agree with plaintiffs' argument. The Minnesota statute provides a variety of procedural protections to pregnant minors. The statute permits the pregnant woman to participate in the court proceedings on her own behalf, and the court may appoint a guardian ad litem. Minn. Stat. § 144.343 subd. 6(c)(ii). Further, proceedings under this section shall be confidential and shall be

given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman. Minn. Stat. § 144.343 subd. 6(c)(iii). This requirement is consistent with Justice Powell's recommendation in *Bellotti II* that the proceedings "be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Bellotti II*, *supra*, 443 U.S. at 644. The statute also requires that the judge of the court who conducts the proceedings shall make written factual findings and legal conclusions and maintain a record of the evidence. Minn. Stat. § 144.343 subd. 6(c)(iii). Finally, the statute makes available to any pregnant woman for whom the court denies an order authorizing an abortion without notification an expedited confidential appeal, waives filing fees at both the trial and appellate levels, and provides access to both the trial and appellate courts on a 24-hours a day, 7 days a week basis. Minn. Stat. § 144.343 subd. 6(c)(iv).

The court concludes that the Minnesota notification/judicial bypass procedure conforms with the constitutional principles first espoused in *Bellotti II* and endorsed by subsequent decisions. The statute does not, on its face, unduly burden the exercise of a minor's fundamental right to choose an abortion. Accordingly, plaintiffs' due process challenge to the facial constitutionality of the Minnesota judicial bypass procedure must be rejected and defendants' motion for summary judgment on this claim will be granted.

B. Constitutionality as Applied

Defendants also contend that the Minnesota notification/judicial bypass procedure does not violate the due process clause as applied. They present three arguments. First, defendants argue that the notification/judicial bypass procedure is being applied in conformance with the relevant constitutional standards of *Bellotti II*. Second, defendants suggest that any issues of fact concerning the so-called effects of the notification/judicial bypass procedure are immaterial to the constitutionality of the statute as applied. Finally, defendants contend that plaintiffs' allegedly anecdotal evidence of isolated

instances in which the notification/judicial bypass procedure has not been applied in conformance with relevant constitutional standards is insufficient to create any genuine issue of fact common to the class concerning the constitutionality of the statute as applied to the class. Defendants present the court with lengthy exhibits to support their position that no material facts are in dispute.

Plaintiffs counter each of defendants' arguments and contend that the defendants have omitted, misstated, and drawn improper inferences from genuine issues of fact. Plaintiffs also present the court with lengthy exhibits which they contend show that there are genuine issues of material facts relating to the operation and effects of the notification/judicial bypass procedure.

This court has reviewed all the files, records and proceedings in this action as they relate to the due process as applied cause of action. Based upon that review, the court is of the opinion that there are genuine issues of material fact in dispute on this claim and that defendants have failed to show that plaintiffs are not entitled to recover under any discernible circumstances. Specifically, plaintiffs have identified disputed issues of material fact relating to confidentiality, delays and inconvenience, and lack of access to the courts in rural counties. This list of material facts in dispute is not all inclusive. The court, at this moment, cannot accept defendants' contention that plaintiffs have presented only immaterial and anecdotal factual issues.

Professors Wright and Miller have cautioned, in the context of summary judgment motions, that "[b]efore the court can apply the law, it must have an adequate factual basis for doing so. In some situations, a fuller development of the facts may serve to clarify the law or help the court determine its application to the case." 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2725, at 85 (2d ed. 1983). In the instant action, the due process as applied challenge provides just such a situation where a complete factual record is necessary prior to a resolution of the claim.

The First Circuit has suggested, in an analogous context, that "a requirement unduly burdensome in operation [as to offend due process] will be struck down even if not clearly invalid on

its face." *Planned Parenthood League v. Bellotti*, *supra*, 641 F.2d at 1011. Thus, plaintiffs allege a viable cause of action. For example, Judge Wright in the Western District of Missouri has enjoined the Missouri statute upheld in *Ashcroft* because the statute "as presently applied unconstitutionally burdens and impinges upon the rights of plaintiff and of other members of her class to the free exercise of an abortion, both in the election and in the effectuation of the same; . . ." *T.L.J. v. Ashcroft*, No. 83-4398-CV-C-5 (W.D. Mo. Nov. 4, 1983) (temporary restraining whether it rationally furthers some legitimate, articulated state purpose . . . ." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973).

Plaintiffs do not argue that the distinction created by the Minnesota statute utilizes any suspect classifications which would justify use of strict scrutiny. Nevertheless, plaintiffs contend that heightened scrutiny is available because the statute impermissibly interferes with the exercise of a fundamental right—the right to choose an abortion. *Roe v. Wade*, 410 U.S. 113 (1973). Therefore, according to plaintiffs, the statutory classifications may be justified only by the strict scrutiny test of a compelling state interest or, at a minimum, by a middle level of scrutiny requiring that the classifications be substantially related to a significant state interest. Defendants, however, argue that if the Minnesota statute does not unduly burden a minor's substantive due process right to choose an abortion, then the classifications can be justified under the rational basis test.

As discussed above, this court has already determined that the Minnesota statute does not on its face impermissibly interfere with a minor's substantive due process right to choose an abortion. Thus, since the exercise of a fundamental right is not infringed, heightened scrutiny is not required. Accordingly, this court will evaluate the Minnesota statute for equal protection purposes under the rational basis test. *See Planned Parenthood League v. Bellotti*, *supra*, 641 F.2d at 1012 (rational basis test used for equal protection analysis of Massachusetts parental consent/judicial bypass statute after *Bellotti II*).

Plaintiffs' first equal protection challenge concerns the distinction between minors seeking abortions and minors seeking

childbirth or other health care services. This equal protection challenge was not before the Supreme Court in *Akron* or *Ashcroft* and was explicitly not reached in *Bellotti II*, *supra*, 443 U.S. at 650 n.30. Nevertheless, the Supreme Court has rejected challenges to abortion statutes in other contexts based on different treatment between abortions and other medical decisions. *See, e.g., Matheson*, *supra*, 450 U.S. at 412-13 (parental notice); *Harris v. McRae*, 448 U.S. 297, 325 (1980) (abortion funding); *Danforth*, *supra*, 428 U.S. at 66-67 (written consent); *see also American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 296 (3d Cir. 1984) (rejecting equal protection challenge to Pennsylvania parental consent/judicial bypass statute).

Furthermore, the Supreme Court has recognized that "the States have a 'significant' interest in certain abortion regulations aimed at protecting children 'that is not present in the case of an adult.' " *Akron*, *supra*, 103 S. Ct. at 2491 n.10 (quoting *Danforth*, *supra*, 428 U.S. at 75). In addition, the state has a legitimate interest in encouraging parental involvement or an alternative judicial procedure in the abortion decision of minors. *See id.* Based on these interests, states may rationally conclude that the decision to have an abortion poses risks to the physical, mental or emotional well-being of minors which are greater than a decision to bear a child or to seek other health care services. *See Bellotti II*, *supra*, 443 U.S. at 640-41, 648-49; *Thornburgh*, *supra*, 737 F.2d at 296; *Planned Parenthood League v. Bellotti*, *supra*, 641 F.2d at 1012-13. Accordingly, this court concludes that the distinction drawn by the Minnesota statute between abortion and other health care services, including childbirth, sought by minors is rationally related to the state's legitimate interest in protecting the well-being of minors and does not violate equal protection.

Plaintiffs' second equal protection challenge addresses the distinction between unemancipated minors as opposed to emancipated minors seeking abortions. A similar equal protection argument was raised in *Planned Parenthood Association v. Ashcroft*, *supra*, 655 F.2d 848, against a Missouri judicial bypass procedure similar to the Minnesota statute challenged here. Appellants argued that the statute was underinclusive

because it did not require the involvement of the parents of emancipated minors regardless of their maturity. The Eighth Circuit rejected the argument, acknowledging that while "the classification may not be perfect, we conclude emancipation is a sufficiently accurate indicia of dependence on parental advice to serve as the basis for a legislative judgment . . . ." *Id.* at 860. As noted above, the state has a legitimate interest in encouraging parental or judicial involvement in the abortion decisions of minors. Despite this interest, however, the state may rationally conclude that minors who are emancipated are sufficiently mature to make an abortion decision without parental or judicial involvement. Accordingly, this court concludes that the distinction drawn by the Minnesota statute between unemancipated and emancipated minors seeking abortions is rationally related to a legitimate state interest and does not violate equal protection.

At oral argument, plaintiffs asserted that there are fact issues precluding the entry of summary judgment on the equal protection claim. Nowhere, however, do plaintiffs present any issues of disputed material fact relevant to this claim other than the facts presented on the due process as applied claim. Moreover, this court concludes that the equal protection claim presents questions of law which subjects it to dismissal upon a summary judgment motion. In sum, the court concludes that the Minnesota notification/judicial bypass statute does not, as a matter of law, violate the equal protection clause and therefore defendants' motion for summary judgment on this claim will be granted.

IV. State Constitutional Claims

Plaintiffs also allege that the Minnesota notification/judicial bypass statute violates due process, privacy, and equal protection provisions of the Minnesota Constitution and that hearings conducted pursuant to the statute constitute a delegation of administrative power to Minnesota state courts in violation of Article III of the Minnesota Constitution. Defendants argue that these claims are barred by the eleventh amendment as recently interpreted by the Supreme Court in *Pennhurst State School & Hospital v. Halderman*, 104 S. Ct. 900 (1984). Plaintiffs, at oral argument, acknowledged that they do not contest the application of *Pennhurst* to their state claims in this action. Accordingly, defendants' motion for summary judgment on the state constitutional claims will be granted.

Based upon the foregoing,

IT IS ORDERED That defendants' motion for partial summary judgment be and the same hereby is granted in part and denied in part.

IT IS FURTHER ORDERED That defendant's summary judgment motion on the facial due process claim be and the same hereby is in all things granted and that claim is hereby dismissed.

IT IS FURTHER ORDERED That defendants' summary judgment motion on the due process as applied claim be and the same hereby is in all things denied.

IT IS FURTHER ORDERED That defendants' summary judgment motion on the equal protection claim be and the same hereby is in all things granted and that claim is hereby dismissed.

IT IS FINALLY ORDERED That defendants' summary judgment motion on the state constitutional claims be and the same hereby is in all things granted and those claims are hereby dismissed.

DATED: January 23, 1985.

/s/ DONALD D. ALSOP

Donald D. Alsop
United States District Judge

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

Submitted June 9, 1987.

Decided Nov. 13, 1987.

Nos. 86-5423, 86-5431.

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated: DIANE P., SARAH L. and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, a nonprofit Minnesota corporation,

Appellees,

v.

THE STATE OF MINNESOTA; RUDY PERPICH as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Appellants.

Appeal from the United States District Court for the District of Minnesota.

Before LAY, Chief Judge, HEANEY, Circuit Judge, and ROSENN,* Senior Circuit Judge.

* The Honorable Max Rosenn, Senior Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

PER CURIAM.

The petition for rehearing by the panel is granted and the opinion of this court previously filed, 827 F.2d 1191 (8th Cir.1987), together with the judgment entered in accordance with it, is vacated and withdrawn. This case will be held in abeyance pending a decision by the Supreme Court of the United States in *Hartigan v. Zbaraz*, ____ U.S. ____, 107 S.Ct. 267, 93 L.Ed.2d 245 (1987). In view of the above order the petition for rehearing en banc is denied as moot.

SO ORDERED.

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

Dec. 31, 1987.

Nos. 86-5423, 86-5431.

JANE HODGSON, et al.,

Appellees,

v.

THE STATE OF MINNESOTA, et al.,

Appellants.

ON PETITION FOR REHEARING EN BANC

The panel's order of November 13, 1987, 835 F.2d 1545, vacating the judgment and opinion in the above-entitled case is hereby rescinded. The panel reinstates the opinion and judgment of the court.

The petition for rehearing by the court en banc is granted; the panel opinion and judgment entered thereon are vacated. The case shall be argued to the court of appeals en banc and submitted on original briefs and record on February 12 at 9:00 a.m. in St. Paul, Minnesota, in the court of appeals Courtroom No. 1, 584 Federal Courts Building, 316 North Robert Street. Each side will be given 30 minutes for oral argument. Additional citations may be submitted to the court under Fed.R.App.P. 28(j).